Supreme Court, U. S.
FILED
APR 18 1980
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1979**

No. 79-1644

LLOYD F. and ELOISE L. CANFIELD,

*Petitioners,*

v.

THE CITY OF NEW YORK,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACK WEINBERG
345 Park Avenue
New York, New York 10022
(212) 593-3000
*Counsel for Petitioners*

*Of Counsel*
GRAUBARD MOSKOVITZ MCGOLDRICK
DANNETT & HOROWITZ
HERMAN E. GOTTFRIED

April 18, 1980

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Opinions, Judgments and Orders Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Constitutional, Statutory and Regulatory Provisions Involved | 3 |
| Statement of the Case | 4 |
| Reasons for Granting the Writ | 8 |
| I. The Second Circuit Decision Permits the Unconstitutional Destruction of Private Property Without Just Compensation | 9 |
| (a) The United States Constitution Mandates That the City Compensate Delaware Riparians | 9 |
| (b) Riparians in the Basin States Have Vested Property Rights in the Natural Flow of the Delaware. An Equitable Apportionment Decree Cannot Defeat These Rights | 12 |
| II. By Acting *Parens Patriae* the Basin States Did Not and Could Not Cede Individual Damage Claims | 16 |
| Conclusion | 20 |


[Appendices A-L are submitted herewith under separate cover.]

## Index to Authorities

PAGE

### Cases

*Albert Hanson Lumber Company Ltd.* v. *United States*, 261 U.S. 581, 587 (1923) ..... 18
*Appeal of Shenandoah Co.*, 2 W.N.C. 46 (Pa. 1875) 18

*Banigan* v. *City of Worcester*, 30 Fed. 392 (C.C. Mass. 1887) ..... 14
*Bauman* v. *Ross*, 167 U.S. 548, 598-599 (1897) .... 18
*Bonelli Cattle Co.* v. *Arizona*, 414 U.S. 313, 317-318, 326, 331 (1973) ..... 10, 13

*California* v. *United States*, 438 U.S. 645 (1978) ... 13
*Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U.S. 641, 659-660 (1890) ..... 18
*Citizens' Electric Co.* v. *Susquehanna Boom Co.*, 270 Pa. 517 (1921) ..... 14
*Coffee* v. *Groover*, 123 U.S. 1, 9-10, 11 (1887) ..... 12, 14
*Connecticut* v. *Massachusetts*, 282 U.S. 660 (1931) .. 19

*Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230 (1907) 17

*Hawaii* v. *Standard Oil Company of California*, 405 U.S. 251 (1972) ..... 17
*Henry Ford & Son, Inc.* v. *Little Falls Fibre Co.*, 280 U.S. 369 (1930) ..... 11
*Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) ..... 13, 19, 20
*Hughes* v. *Washington*, 389 U.S. 290, 293, 298 (1967) 10, 13

*Kansas* v. *Colorado*, 206 U.S. 46, 94, 100 (1907) .... 12, 17
*Kendrick* v. *Piper Aircraft Corp.*, 265 F.2d 482 (3d Cir. 1959) ..... 18
*Knight* v. *U.S. Land Association*, 142 U.S. 161, 183-184 (1891) ..... 14

*Maine* v. *M/V Tamano*, 357 F.Supp. 1097 (D. Maine 1973) ..... 17



PAGE

*Mannville Co.* v. *City of Worcester*, 138 Mass. 89 (1884) ..... 14
*Matter of Van Etten* v. *City of New York*, 226 N.Y. 483 (1919) ..... 14, 18
*McKenna* v. *Austin*, 134 F.2d 659, 664 (D.C. Cir. 1943) ..... 18

*Naglee* v. *Ingersoll*, 7 Pa. 185, 201-202 (1847) ..... 12
*Nebraska* v. *Iowa*, 406 U.S. 117 (1972) ..... 9, 12
*New Jersey* v. *New York*, 283 U.S. 336, 283 U.S. 805 (1931) .....5, 15, 19
*New Jersey* v. *New York*, 347 U.S. 995 (1954) .....2, 3, 5
*New Mexico* v. *Aamodt*, 537 F.2d 1102, 1107 (10th Cir. 1976), *cert. denied sub nom, New Mexico* v. *United States*, 429 U.S. 1121 (1977) ..... 17
*North Dakota* v. *Minnesota*, 263 U.S. 365, 374-376 (1923) .....3, 9, 17, 18

*Oakes Manufacturing Co.* v. *City of New York*, 206 N.Y. 221, 228 (1912) ..... 15
*Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 371-372 (1977) .....9, 10, 16

*Pine* v. *City of New York*, 112 Fed. 98 (2d Cir. 1901), *injunction rev'd for award of damages*, 185 U.S. 93 (1902) ..... 14, 15

*Ross* v. *Licht*, 263 F. Supp. 395, 411 (S.D.N.Y. 1967).. 18
*Rundle* v. *Delaware and Raritan Canal Co.*, 21 Fed. Cas. 6, 13 (No. 12,139) (C.C.E.D. Pa. 1849), *aff'd*, 14 How. (55 U.S.) 80 (1852) .....13, 14, 18

*Shively* v. *Bowlby*, 152 U.S. 1, 14 (1894) ..... 12, 13
*Storer* v. *Freeman*, 6 Mass. Rep. 435, 438 (1810) ... 13
*Strobel* v. *Kerr Salt Co.*, 164 N.Y. 303 (1900) ..... 14

*Tyler* v. *Wilkinson*, 24 Fed. Cas. 472, 474 (No. 14,312) (D.C.R.I. 1827) ..... 13

PAGE

*United States* v. *Rio Grande Dam and Irrigation Co.*, 174 U.S. 690, 702 (1899) ..... 13

*Wagner* v. *Purity Water Co.*, 241 Pa. 328, 334 (1913) 18

*Wyoming* v. *Colorado*, 286 U.S. 494 (1932) ..... 13

*Yates* v. *Milwaukee*, 10 Wall. (77 U.S.) 497, 504 (1871) ..... 9, 10

*York Haven Water & Power Co.* v. *York Haven Paper Co.*, 201 Fed. 270, 275-276 (3d Cir. 1912) .. 14

*Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973) 6

*Constitution, Statutes and Rules*

Delaware River Basin Compact §§ 1.6(a), 3.4 and 14.19, Pub. L. No. 87-328, 75 Stat. 688 (1961) .... 3, 6

N.Y.C. Admin. Code, Ch. 51, Title K, §§ K 51-26.0, K 51-44.0 ..... 4

N.Y. Env. Conserv. L. § 15-0801 (1976) ..... 4

PA. CONST. art. 1, § 10 ..... 4, 18

Report of Secretary of Land Office as contained in 5 Smith, *Laws Pa.* (1812)(i), at xxvii-xxix ..... 4, 14

1 Smith, *Laws Pa.* (1778) at 481 ..... 4, 14

U.S. CONST. amend. V and amend. XIV, § 1 ..... 3

28 U.S.C. § 1254(1) ..... 2

28 U.S.C. §§ 1331(a) and 1332(a)(1) ..... 4

*Other Authorities*

J. W. Pomeroy, *An Introduction to the Constitution of the United States* § 47 (1880) ..... 13

3 J. Kent, *Commentaries on American Law* 439 (3d Ed.) ..... 13



PAGE

Gould, *Law of Waters* § 204 (1891) ..... 13

N.Y. Times, 9/30/79, Col. 1, p. 36 ..... 15

Lewis, *On Eminent Domain* §§ 61, 62 (1888) ..... 13

Black's Pomeroy, *On Water Rights* §§ 8, 9 (1893) .. 13

Gould, *On Waters* § 32 (2d Ed.) ..... 13

G. B. French and J. Smith, *Power to Divert An Interstate River*, 8 Harv. L. Rev. 138, 148-149 (1894) .. 13

Prosser, *Torts* at 314 (4th Ed. 1971) ..... 18

Restatement, *Torts* §§ 875, 876 (1939) ..... 18

39 Pennsylvania Law Encyclopedia, *Waters* § 219 (1961) ..... 14

IN THE

# Supreme Court of the United States

**October Term, 1979**

**No.**

---

LLOYD F. and ELOISE L. CANFIELD,

*Petitioners,*

v.

THE CITY OF NEW YORK,

*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Lloyd F. and Eloise L. Canfield, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 27, 1979, in Docket No. 78-7199.

### Opinions, Judgments and Orders Below

The opinion of the United States District Court for the Southern District of New York, which awarded judgment in favor of petitioners and others similarly situated, is reported at 450 F. Supp. 846 and appears in Appendix A.[1] The judgment of the District Court appears in Appendix B. The opinion of the Court of Appeals, which reversed the

---

[1] References are to the appendices submitted herewith under separate cover.

judgment of the District Court, is reported at 606 F.2d 358 and appears in Appendix C. The judgment of the Court of Appeals appears in Appendix D. The orders of the Court of Appeals, which denied rehearing and rehearing *in banc*, appear in Appendix E.

## Jurisdiction

The judgment of the Court of Appeals was entered on September 27, 1979, in Docket No. 78-7199. A timely petition for rehearing containing a suggestion for rehearing *in banc* was denied on January 23, 1980, and this petition for certiorari is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## Questions Presented

1. Whether a Supreme Court equitable apportionment decree, or an interstate compact approved by Congress, which authorizes a municipality to make massive daily diversions of interstate river water, abrogates the municipality's obligation under the Fifth and Fourteenth Amendments to pay just compensation to private riparian landowners who were not parties to the decree or compact:

   (a) for riparian property damages caused by the municipality's diversions; and

   (b) for damages resulting from the municipality's pollution and ruination of the undiverted portions of the water.

2. Whether the Second Circuit correctly interpreted this Court's equitable apportionment decree, entered in *New Jersey* v. *New York*, 347 U.S. 995 (1954), as abrogating the



constitutional obligation of the respondent, The City of New York, to pay just compensation for tortious injuries that the City's waterworks on the Delaware River caused to thousands of riparian landowners who were not parties to the decree.

3. Whether there is a conflict between (a) this Court's decision in *North Dakota* v. *Minnesota*, 263 U.S. 365 (1923), which held that, in a Supreme Court proceeding to determine rights to use of interstate river water, a state acting *parens patriae* cannot represent individual damage claims of its private riparian landowners who are not parties to the proceeding, and (b) the Second Circuit's decision which holds that, in a Supreme Court proceeding to determine rights to use of interstate river water, a state acting *parens patriae* does represent individual damage claims of its private riparian landowners who are not parties to the proceeding.

## Constitutional, Statutory and Regulatory Provisions Involved[2]

(a) The United States Constitution provisions involved are U.S. CONST. amend. V and amend. XIV, § 1, providing for just compensation and due process.

(b) The federal statute involved is the Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688 (1961), which, in pertinent part, (i) preserves riparian rights along the Delaware River (Section 14.19), and (ii) waives the right of the signatory states to apply for modification of this Court's equitable apportionment decree, entered June 7, 1954, in *New Jersey* v. *New York*, 347 U.S. 995 (Sections 1.6(a) and 3.4).

[2] The pertinent texts of the constitutional, statutory and regulatory provisions involved herein appear in Appendix F.

(c) The state constitutional, statutory and regulatory provisions involved are:

(1) Pa. Const. art. 1, § 10, providing that just compensation be made or secured before private property is taken for or applied to public use.

(2) 1 Smith, *Laws Pa.* (1778) at 481, and Report of Secretary of Land Office as contained in 5 Smith, *Laws Pa.* (1812) (i), at xxvii-xxix, which "ratified" private property rights that had vested in individual landowners before the Revolutionary War.

(3) N.Y.C. Admin. Code, Ch. 51, Title K, §§ K51-26.0, K 51-44.0, providing, *inter alia,* that New York City shall pay compensation to individuals whose riparian properties on the New York State side of the Delaware River have been damaged as a result of condemnation or permanent trespass by the City.

(4) N.Y. Env. Conserv. L. § 15-0801, setting forth the New York State legislature's findings, in 1976, that New York City's impoundment and release operations on the Delaware River "have damaged the recreational uses" of the River.

## Statement of the Case

a) Bases for Federal Jurisdiction

Petitioners, citizens of Pennsylvania, commenced this action against respondent, The City of New York ("City"), pursuant to 28 U.S.C. § 1331(a) (federal question) and 28 U.S.C. § 1332(a)(1) (diversity of citizenship).

b) Background

This case emanates from this Court's equitable apportionment decree ("Decree") empowering the City to take



huge amounts of water from the Delaware River, which originates in New York State and forms a boundary of the States of New York, Pennsylvania, New Jersey and Delaware ("Basin States"). *New Jersey* v. *New York,* 347 U.S. 995 (1954).[3] The Decree conditioned the City's authority on its construction of three impounding reservoirs at the headwaters of the Delaware River and on its compliance with certain provisions relating to stream management. Significantly, the Decree did not address the right of thousands of private riparian landowners along the Delaware to claim compensation for property damages that would be caused by the City's impoundment and withdrawals of River water.[4]

In 1961, the Basin States entered into a compact ("Compact") whereby they, in essence, waived their right to apply for modification of the Decree and agreed to preserve the riparian rights of private landowners along the Delaware. The Compact provides, in pertinent part:

> "Nothing contained in this compact shall be construed as affecting or intending to affect or in any way to interfere with the law of the respective signatory parties relating to riparian rights." Compact § 14.19 (Appendix F at 3f)

The legislative history of the Compact shows that the provision preserving riparian rights was added to the Compact:

> "to assuage the fears of those who may think that the compact will change private water rights." (Appendix H at 1h)

---

[3] The Decree amended and superseded a decree of this Court entered May 25, 1931, 283 U.S. 805 (1931).

[4] A map showing the Delaware River, the City's three reservoirs, and the locations of a few of the thousands of riparian parcels damaged by the City's waterworks, appears in Appendix G.

After the Basin States signed the Compact, it was approved by Congress. Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688 (1961).

In May 1967, the City completed construction of its third reservoir and commenced full operation of its Delaware water system. 450 F. Supp. at 850; Appendix A at 5a.

c) Nature of This Action

Petitioners brought this action in 1971. Their complaint charged that the City's massive daily diversions of Delaware River water and its mismanagement of impounding reservoirs and dams have caused the River to become polluted and otherwise ruined as a recreational site. As a result, thousands of riparian properties along the Delaware have been irreparably damaged, including petitioners' property on the Pennsylvania side of the River.[5]

The City admits that its operations on the Delaware have drastically altered the natural volume of flow, velocity, temperature and quality of the River, and acknowledges that it has already paid millions of dollars in damages to owners of property situated on the New York State side of the River (Appendix I). However, the City has refused to compensate riparians outside New York State for the same loss. The City argues that it is exempt from paying damages to out-of-state landowners because its waterworks were authorized by this Court's Decree, to which the Basin States were parties.

[5] Class action status was denied in this case after the decision in *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), that each member of a spurious class, whether a named or an unnamed plaintiff, must satisfy the jurisdictional amount for suits in federal courts. Numerous individual actions by Delaware River riparian landowners against the City are presently pending in New York state and federal courts.



d) The Decisions Below

The District Court made the following factual findings: Since May 1967, when the City commenced full operation of its Delaware reservoirs, it has been impounding and diverting to its water supply nearly one-half the water that would otherwise flow naturally past riparian properties along the River. The City also has impaired the undiverted portions of the River by releasing only minimal amounts of water for extended periods and intermittently releasing huge quantities of unseasonably cold water through its improperly constructed dams. 450 F. Supp. at 856-858; Appendix A at 29a-42a. These massive diversions and incessant manipulations of the undiverted water have permanently damaged the River's ecology and recreational uses. In particular, there has been a growth of slime and algae along the River and an increase in mosquitoes and insects on riparian properties. The warm water fisheries of the Delaware have been almost totally destroyed and efforts to turn the River into a cold water fishery have failed. Recreational activities such as swimming and boating also have been adversely affected. 450 F. Supp. at 870-871; Appendix A at 97a-103a.

The District Court held that petitioners and other riparian landowners similarly situated have a vested property right in the natural, unabated flow of the entire Delaware River, both for commercial and recreational purposes. The Decree was entered to resolve a dispute among the Basin States over the River's water and the Decree did not, and indeed could not, abrogate the right of nonparty individual riparian landowners to receive compensation for damages caused by the City's diversions. The District Court further held that even if it were to accept, "for the sake of argument", the City's contention that it may not be required to pay riparian property owners for *water*

*actually taken* pursuant to the Decree, the City nevertheless must compensate the landowners for property damages resulting from its pollution and ruination of the *remaining water.* 450 F. Supp. at 867; Appendix A at 81a-82a.

The Court of Appeals reversed on the law. It held that the Decree adjudicated the rights of individual landowners together with those of the Basin States acting *parens patriae;* and that the Supreme Court's equitable apportionment of the Delaware *ipso facto* bars individual riparians from asserting damage claims against the City, either for water actually taken or for impairment of the remaining water. The Second Circuit concluded that compensation payments to private riparian landowners would negate the Decree and would be inconsistent with the Decree's "supremacy"; and that the Compact is a further bar to individual damage claims since the Basin States thereby agreed not to seek modification of the City's authority under the Decree.

Significantly, the decision of the Court of Appeals is the first to deny riparians the right to sue an out-of-state municipal diverter for damaging their property.

## Reasons for Granting the Writ

The Second Circuit decision violates the constitutional precept that just compensation must be paid for private property taken for public use, and denies thousands of landowners outside New York the same protections afforded New York landowners. If the decision is permitted to stand, equitable apportionment decrees and interstate compacts will be viewed by diverters as authority to expropriate private property without payment of just compensation, and as a license to pollute and otherwise ruin undiverted interstate water without just compensation.



The Second Circuit decision, that individual damage claims were adjudicated by the Basin States acting *parens patriae,* expands the *parens patriae* doctrine well beyond the limits which this Court has imposed on that doctrine.

This Court has not explicitly ruled on the right of riparian owners to claim compensation for property damages caused by diversions authorized by equitable apportionment decrees. However, the Second Circuit's rejection of such claims conflicts with Supreme Court decisions that (a) vested riparian property rights may not be destroyed or impaired, even for the public good, without just compensation, *Yates* v. *Milwaukee,* 10 Wall. (77 U.S.) 497 (1871); (b) vested property rights are not subject to later defeasance by operation of any doctrine of federal common law, *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.,* 429 U.S. 363, 371-372 (1977); and (c) both the *parens patriae* doctrine and the Eleventh Amendment bar a state from representing individual riparians' damage claims, *North Dakota* v. *Minnesota,* 263 U.S. 365, 374-376 (1923). In addition, the Court of Appeals decision renders nugatory the Compact provision which expressly preserves riparian rights along the Delaware and the decision therefore is in conflict with the Court's determination in *Nebraska* v. *Iowa,* 406 U.S. 117 (1972).

## I.

## The Second Circuit Decision Permits the Unconstitutional Destruction of Private Property Without Just Compensation.

### (a) The United States Constitution Mandates That the City Compensate Delaware Riparians

As shown in point I(b) below, private landowners along the Delaware have vested property rights in the natural flow of the entire River. Their riparian property rights

may not be destroyed or impaired, even for the public good, without just compensation. *See, e.g., Yates* v. *Milwaukee,* 10 Wall. (77 U.S.) 497 (1871), wherein this Court held that:

> "This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and *if necessary that it be taken for the public good, upon due compensation.*" 10 Wall. (77 U.S.) at 504. (Emphasis supplied)

The vitality of the holding in *Yates* was most recently reaffirmed by the Court in *Bonelli Cattle Co.* v. *Arizona,* 414 U.S. 313, 326 (1973).[6]

Neither the courts nor the legislature may circumvent Fifth and Fourteenth Amendment prohibitions against confiscation or impairment of property without just compensation and without due process by making laws which retroactively convert vested private property into public property. *See, e.g., Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.,* 429 U.S. 363, 371-372 (1977); *Bonelli Cattle Co.* v. *Arizona,* 414 U.S. 313, 331 (1973), citing and quoting with approval the concurring opinion of Mr. Justice Stewart in *Hughes* v. *Washington,* 389 U.S. 290, 298 (1967).

Yet, such an unconstitutional result follows from the Second Circuit's erroneous conclusion that the device of equitable apportionment permits the destruction of individual riparian property without just compensation. As the District Court observed, even assuming, *arguendo,* that the City may not be required to pay riparians on the Delaware for *water actually taken* pursuant to the Decree, the City surely must compensate the landowners for property damages resulting from the City's pollution and ruination of the *remaining water.* 450 F. Supp. at 867; Appendix A at 81a-82a; *see, e.g., Henry Ford & Son, Inc.* v. *Little Falls Fibre Co.,* 280 U.S. 369 (1929).

[6] On entirely different grounds, *Bonelli* was overruled by *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.,* 429 U.S. 363 (1977).



The Court of Appeals decision also erroneously imputes to the Supreme Court the intention to violate the equal protection provisions of the United States Constitution by discriminating in favor of property owners in New York and against property owners in the other Basin States. In denying recovery to petitioners, the Court of Appeals reasoned that since their State, Pennsylvania, argued in favor of equitable apportionment in the Supreme Court proceedings, petitioners and other Pennsylvania riparians lost their rights in the natural flow of the Delaware as well as their right to sue the City for impairment of the undiverted water. The fallacy of this reasoning becomes readily apparent when one considers that New York also argued in favor of equitable apportionment. Yet New York riparians situated directly across the river from Pennsylvania riparians retained the property rights in the natural flow of the Delaware and have already been compensated by the City for damages caused by its reduction, manipulation and worsening of the flow. See cases cited at 450 F. Supp. at 868-869; Appendix A at 88a-92a.

It is manifest that the Supreme Court could not have intended that this result follow from its Decree. Nor could the Basin States have intended that such a result follow from their signing the Compact. Indeed, the Compact expressly preserves riparian rights along the Delaware, and

the legislative history of the Compact shows that the provision preserving riparian rights was added to the Compact:

> "to assuage the fears of those who may think that the compact will change private water rights." (Appendix H at 1h)

Since the Compact expressly preserves private water rights, and since it was signed before the City began full operation of its Delaware water system, the Court of Appeals erred in holding that by signing the Compact the Basin States ceded the right of individual riparians to sue the City for damages resulting from its impairment of the *undiverted* water. *See, Nebraska* v. *Iowa,* 406 U.S. 117 (1972).

**(b) Riparians in the Basin States Have Vested Property Rights in the Natural Flow of the Delaware. An Equitable Apportionment Decree Cannot Defeat These Rights.**

An historical review of riparian property rights shows that the Court of Appeals erred when it determined that individual landowners' rights in the natural flow of the Delaware were derived from State grants; were limited by State boundaries; and were circumscribed by this Court's federal common law which the Court applied to apportion the Delaware.

Riparian rights in the Basin States, as in other eastern states, were derived from the Crown and vested in individual landowners during the colonial period.[7] Before the

[7] An historical review of riparian property rights (*Coffee* v. *Groover,* 123 U.S. 1, 11 (1887)) shows that English common law prevailed in the thirteen colonies before the Revolution. *See, e.g., Kansas* v. *Colorado,* 206 U.S. 46, 94 (1907); *Shively* v. *Bowlby,* 152 U.S. 1, 14 (1894); *Naglee* v. *Ingersoll,* 7 Pa. 185, 201-202 (1847):

*(footnote continued on following page)*



Revolution, every riparian along a river, including the Delaware, possessed the same right in the natural, unabated flow of the entire river, *unaffected by territorial boundaries.* The distinct property right in the corpus of the water belonged to the Crown and its proprietaries.[8] After the Revolutionary War, the Crown and its proprietaries ceded their right in the corpus of the water to the original states.[9] The distinct property right in the natural flow that had previously vested in private landowners remained with them, according to principles of international law:

*(footnote continued from preceding page)*

*Storer* v. *Freeman,* 6 Mass. Rep. 435, 438 (1810); Gould, *On Waters* § 32 (2d Ed.). By contrast, in western states, property rights originated with or were dependent upon grants from federal or state authorities. *See, e.g., California* v. *United States,* 438 U.S. 645 (1978); *Bonelli Cattle Co.* v. *Arizona,* 414 U.S. 313, 317-318 (1973). Thus, in western states (unlike the thirteen colonial states) the rights of riparians may be no greater than the rights granted to them by their respective states. Hence, to the extent that the Court of Appeals relied upon decisions involving property rights in western states [such as *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.,* 304 U.S. 92 (1938), and *Wyoming* v. *Colorado,* 286 U.S. 494 (1932)], the court was clearly in error.

[8] *See, e.g., Hughes* v. *Washington,* 389 U.S. 290, 293 (1967); *United States* v. *Rio Grande Dam and Irrigation Co.,* 174 U.S. 690, 702 (1899); *Rundle* v. *Delaware and Raritan Canal Co.,* 21 Fed.Cas. 6, 13 (No. 12,139) (C.C.E.D. Pa. 1849), *aff'd,* 14 How. (55 U.S.) 80 (1852); *Tyler* v. *Wilkinson,* 24 Fed. Cas. 472, 474 (No. 14,312) (D.C.R.I. 1827); Black's Pomeroy, *On Water Rights* §§ 8, 9 (1893); Gould, *Law of Waters* § 204 (1891); Lewis, *On Eminent Domain* §§ 61, 62 (1888); G. B. French and J. Smith, *Power to Divert An Interstate River,* 8 Harv. L. Rev. 138, 148-149 (1894); 3 J. Kent, *Commentaries On American Law* 439 (3d Ed.); J. W. Pomeroy, *An Introduction to the Constitution of the United States* § 47 (1880). The individual landowner's riparian right to the natural flow was subject to navigational servitude held by the Crown for the benefit of the public. Now the navigational servitude is embodied in the Commerce Clause of the United States Constitution.

[9] *See, e.g., Bonelli Cattle Co.* v. *Arizona,* 414 U.S. 313, 317-318 (1973); *Shively* v. *Bowlby,* 152 U.S. 1, 14 (1894); *Rundle* v. *Delaware and Raritan Canal Co., supra* note 8; Gould, *On Waters,* § 32 (2d Ed.).

> "[A]s a general principle of international law, . . . cession of territory only operates upon the sovereignty and jurisdiction, including the right to the public domain, and *not upon the private property of individuals which had been segregated from the public domain before the cession.* . . . The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed." *Coffee* v. *Groover*, 123 U.S. 1, 9-10 (1887). (Emphasis supplied)[10]

Since the Revolution, federal and state courts in the eastern states have preserved and protected individual common law riparian property rights that vested during the colonial period.[11] Courts protect such rights, *without regard to state boundaries*, by awarding damages in favor of riparians and against municipalities in neighboring states which divert water to supply their inhabitants.[12]

In *Pine* v. *City of New York*, 112 Fed. 98 (2d Cir. 1901), *injunction rev'd for award of damages*, 185 U.S. 93 (1902),

[10] In 1779, Pennsylvania passed statutes which "ratified" private property rights that had vested in individual landowners before the Revolution. See 1 Smith, *Laws Pa.* (1778) at 481; Report of Secretary of Land Office as contained in 5 Smith, *Laws Pa.* (1812) (i), at xxvii-xxix. (Appendix F at 3f-9f). Of course, even without such statutory provision the transfer of territory by the Crown would not affect vested private property rights. *See, e.g., Knight* v. *U.S. Land Association*, 142 U.S. 161, 183-184 (1891).

[11] *See, e.g., York Haven Water & Power Co.* v. *York Haven Paper Co.*, 201 Fed. 270, 275-276 (3d Cir. 1912); *Citizens' Electric Co.* v. *Susquehanna Boom Co.*, 270 Pa. 517 (1921); 39 Pennsylvania Law Encyclopedia, *Waters* § 219 (1961); *Matter of Van Etten* v. *City of New York*, 226 N.Y. 483 (1919); *Strobel* v. *Kerr Salt* Co., 164 N.Y. 303 (1900).

[12] *See, e.g., Banigan* v. *City of Worcester*, 30 Fed. 392 (C.C. Mass. 1887); *Manville Co.* v. *City of Worcester*, 138 Mass. 89 (1884); *see also, Rundle* v. *Delaware and Raritan Canal Co.*, 21 Fed. Cas. 6 (No. 12,139) (C.C.E.D. Pa. 1849), *aff'd*, 14 How. (55 U.S.) 80 (1852).



the Second Circuit correctly applied the water laws prevailing in the eastern states since colonial times, and held that riparian rights are not affected by state boundaries. In fact, the Second Circuit in *Pine* sought to protect out-of-state landowners by issuing an *injunction* against the City's diversions and manipulations within New York State. The Supreme Court vacated the injunction on the condition that the City pay *damages* to the out-of-state riparians.[13]

Thus, when the equitable apportionment proceedings underlying the Decree began, the Basin States jointly held the right in the corpus of the Delaware's water whereas riparians owned the right to the natural, unabated flow of the *entire* Delaware, regardless of where their property was situated. In those proceedings, the Supreme Court applied the federal common law that it had created, to determine New York's share of the corpus of the waters that it held jointly with the other Basin States. But federal common law could not divest individual landowners from their separate vested property rights in the natural flow of the Delaware. As the Court recently stated:

[13] Perhaps the Court of Appeals in this case declined to follow its own decision in *Pine* v. *City of New York* because of its concern that the City might incur "costly disbursements" and "unreasonable damage burdens." 606 F.2d at 366, 367, 369. [Following the decision, the City reported that it could have been involved in claims by "10,000 New Jersey and Pennsylvania property owners" which "could have cost the City $15 million" (N.Y. Times, 9/30/79, Col. 1, p. 36; Appendix J).]

However, in expressing its concern, the Court of Appeals overlooked the fact that *the City sells the water that it diverts from riparians on the Delaware and thereby derives substantial revenues. See, e.g., Oakes Manufacturing Co.* v. *City of New York*, 206 N.Y. 221, 228 (1912) [See Appendix K for City's revenues from water charges, and Appendix L for Special Master's findings on City's profits, *New Jersey* v. *New York*, 283 U.S. 336 (1931).] Moreover, *Pine* v. *City of New York* shows that the City's costs are not relevant to a determination of its liability. 103 Fed. at 338; 185 U.S. at 95.

> "[Vested property rights are] not subject to later defeasance by operation of any doctrine of federal common law." *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 371-372 (1977).

Clearly, the Court's statement of the rule refutes the Court of Appeals' conclusion that compensation payments to riparian landowners would be inconsistent with the "supremacy" of a Supreme Court equitable apportionment decree. 606 F.2d at 366; Appendix C at 16c.

*To summarize,* equitable apportionment decrees and interstate compacts should be held to affect private riparian owners to the same extent as, but no more than, any other taking by eminent domain—*viz.*, although riparians may not enjoin diversions authorized by decrees or compacts, the landowners must be justly compensated by the diverters for the resultant damages to their riparian properties. Such holding would afford riparian owners the protections guaranteed them by the Constitution and would harmonize the doctrines of equitable apportionment and riparian rights. The Second Circuit's contrary holding denies constitutional protections and nullifies this Court's decisions that riparians' right to the natural, unabated flow of the water is property which may not be destroyed or impaired without just compensation, and that federal common law cannot be employed to defeat vested property rights.

## II.

### By Acting *Parens Patriae* the Basin States Did Not and Could Not Cede Individual Damage Claims.

The Court of Appeals misapprehended the *parens patriae* doctrine when it expressed the opinion that in the proceedings underlying the Decree Pennsylvania represented individual riparian damage claimants and bartered their claims for interests of its other citizens.



It is well-established that when a state brings an action as *parens patriae* it acts solely for the general welfare of all of its citizens, representing interests that are separate and distinct from those of its individual citizens. For a state to represent individual damage claimants in such proceedings would violate not only the *parens patriae* doctrine but also the Eleventh Amendment prohibition against suits by citizens of one state against another state.[14] Furthermore, when acting *parens patriae,* a state cannot assert rights in favor of one group of its citizens against another.[15]

The decision in *North Dakota* v. *Minnesota,* 263 U.S. 365 (1923), is directly in point. There, Minnesota accelerated the speed of flow and increased the volume of water of a river in Minnesota so that when the river reached North Dakota it overflowed and damaged valuable riparian farm properties situated there. The Supreme Court permitted North Dakota to invoke the Court's original jurisdiction to obtain *injunctive relief* for the benefit of the general welfare of its citizens. However, the Court held that North Dakota could not utilize the *parens patriae* proceeding to pursue *individual damage claims* of its riparian farmers. To per-

---

[14] *Hawaii* v. *Standard Oil Company of California,* 405 U.S. 251 (1972); *North Dakota* v. *Minnesota,* 263 U.S. 365 (1923); *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230 (1907); *Maine* v. *M/V Tamano,* 357 F. Supp. 1097 (D. Maine 1973).

[15] *See, e.g., Hawaii* v. *Standard Oil Company of California, supra* at 258, n.12; *New Mexico* v. *Aamodt,* 537 F.2d 1102, 1107 (10th Cir. 1976), *cert. denied sub nom, New Mexico* v. *United States,* 429 U.S. 1121 (1977). The Court of Appeals' suggestion that Pennsylvania struck a bargain with the City and State of New York in the equitable apportionment proceedings is contrary to this Court's pronouncement that the Court is not authorized to make contracts between two states. *Kansas* v. *Colorado,* 206 U.S. 46, 100 (1907).

mit North Dakota to recover damages on behalf of its individual riparian landowners, the Court held, would also circumvent the Eleventh Amendment which prohibits suits by citizens of one state against another state.

In both *North Dakota* v. *Minnesota* and in the Supreme Court proceeding underlying issuance of the Decree, the Court determined disputes between states regarding rights to use of interstate river water. As in *North Dakota* v. *Minnesota,* here too, damage claims of individual riparians injured by drastic alterations of the volume of flow, velocity and quality of the river could not have been and were not adjudicated by the states acting *parens patriae* before the Court.[16]

---

[16] The Court of Appeals' view that Pennsylvania, in effect, ceded to the City the riparian rights of individual Pennsylvanians and gave the City the license to impair the value of their properties, is also contrary to the Pennsylvania Constitution. It provides that private property may not be taken for public use "without just compensation being *first* made or secured." PA. CONST., art. 1, § 10 (Appendix F at 3f) (Emphasis supplied).

Since Pennsylvania riparians have not been compensated, the City is a trespasser and must pay damages. *See, e.g., Albert Hanson Lumber Company, Ltd.* v. *United States,* 261 U.S. 581, 587 (1923); *Bauman* v. *Ross,* 167 U.S. 548, 598-599 (1897); *Cherokee Nation* v. *Southern Kansas R. Co.,* 135 U.S. 641, 659-660 (1890); *Wagner* v. *Purity Water Co.,* 241 Pa. 328, 334 (1913); *Appeal of Shenandoah Co.,* 2 W.N.C. 46 (Pa. 1875); *Matter of Van Etten* v. *City of New York,* 226 N.Y. 483 (1919).

The City is liable for the full amount of the damages even if Pennsylvania is deemed a joint tortfeasor. *Kendrick* v. *Piper Aircraft Corp.,* 265 F.2d 482, 485 (3d Cir. 1959); *McKenna* v. *Austin,* 134 F.2d 659, 664 (D.C. Cir. 1943); *Ross* v. *Licht,* 263 F. Supp. 395, 411 (S.D.N.Y. 1967); Restatement, *Torts* §§ 875, 876 (1939); Prosser, *Torts* at 314 (4th Ed. 1971).

*See also, Rundle* v. *Delaware and Raritan Canal Co.,* 21 Fed. Cas. 6 (No. 12,139) (C.C.E.D. Pa. 1849), *aff'd,* 14 How. (55 U.S.) 80 (1852), which holds that Pennsylvania riparians' right to recover damages from an out-of-state diverter is governed by Pennsylvania law.



In fact, Supreme Court records relating to equitable apportionment proceedings show that state-diverters acknowledged liability for damages to individual riparians.

Thus, the record in *New Jersey* v. *New York,* 283 U.S. 336 (1931), shows that New York:

> "expressed the ability and willingness of the City of New York to pay damages to anyone injured in New Jersey, . . ." Record, Index No. 64 at 23 (Appendix L at 1L)

Similarly, the record in *Connecticut* v. *Massachusetts,* 282 U.S. 660 (1931) (the only other equitable apportionment case involving colonial riparian rights states) demonstrates that Massachusetts conceded its liability to pay damages to Connecticut riparian landowners. In its pleadings, Massachusetts submitted that:

> "[B]y the common law of the Commonwealth of Massachusetts . . . a remedy is given not only to citizens of the Commonwealth of Massachusetts but to citizens of the State of Connecticut for damages suffered within their borders by virtue of any diversion authorized by the said Commonwealth." Record, Index No. 15 at 27-28 (Appendix L at 3L)

*Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.,* 304 U.S. 92 (1938), which the Court of Appeals found to be controlling, was not a damage action by riparian landowners. It was an injunction action by an *appropriator* of water, to halt upstream diversions authorized by an interstate compact. The plaintiff appropriator in that case did not seek damages, and nowhere in the decision did this Court state that riparians did not have an individual right to sue. Yet the Court of Appeals read the Supreme Court's holding in *Hinderlider* as barring damage claims by Dela-

ware River riparians against the City. In addition, the Court of Appeals overlooked the record in *Hinderlider* in which the trial court stated that individual riparians *had* a right to sue for damages:

> "Plaintiff's counsel seems to concede that this is not an action for damages, but is for injunction; and that no . . . judgment for damages can be rendered. As this action is brought by the corporation only, while the principal damages (if damages should be recoverable) accrue to the individual farmers, separately, that concession of plaintiff's counsel seems to be right." Record, Index No. 437 at 53 (Appendix L at 3L-4L).

## Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

JACK WEINBERG
345 Park Avenue
New York, New York 10022
(212) 593-3000

*Counsel for Petitioners*

GRAUBARD MOSKOVITZ MCGOLDRICK
DANNETT & HOROWITZ
HERMAN E. GOTTFRIED

*Of Counsel*

April 18, 1980

Supreme Court, U.S.
FILED
APR 18 1980
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1644

LLOYD F. and ELOISE L. CANFIELD,

*Petitioners,*

v.

THE CITY OF NEW YORK,

*Respondent.*

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACK WEINBERG
345 Park Avenue
New York, New York 10022
(212) 593-3000
*Counsel for Petitioners*

*Of Counsel*
GRAUBARD MOSKOVITZ MCGOLDRICK
DANNETT & HOROWITZ
HERMAN E. GOTTFRIED

April 18, 1980

TABLE OF CONTENTS


| | | Page in Appendix |
|---|---|---|
| Appendix A | Opinion of the United States District Court For the Southern District of New York | 1a-145a |
| Appendix B | Judgment of the District Court | 1b-2b |
| Appendix C | Opinion of the United States Court of Appeals For the Second Circuit | 1c-28c |
| Appendix D | Judgment of the Court of Appeals | 1d-4d |
| Appendix E | Orders of the Court of Appeals Denying Rehearing and Rehearing *in banc* | 1e-4e |
| Appendix F | Constitutional, Statutory and Regulatory Provisions Involved | 1f-14f |

| | | Page in Appendix |
|---|---|---|
| Appendix G | Map Showing the Delaware River and Three City Reservoirs | 1g |
| Appendix H | Legislative History of Delaware River Basin Compact § 14.19 | 1h-4h |
| Appendix I | Memorandum Acknowledging that New York City Pays Damages to New York State Riparian Landowners | 1i-3i |
| Appendix J | N.Y. Times, 9/30/79, Col. 1, p. 36 | 1j-4j |
| Appendix K | City's Revenues from Water Charges, as Reflected in the Comptroller's Reports for Fiscal Years 1970-1977 | 1k |
| Appendix L | Report of the Special Master, New Jersey v. New York, 283 U.S. 336 (1931) Record, Index No. 64, Original at 23 and 41 | 1L-2L |
| | Connecticut v. Massachusetts, 282 U.S. 660 (1931), Record, Index No. 15 at 27-28 | 2L-3L |
| | Hinderlider v. La Plata, 304 U.S. 92 (1938), Record, Index No. 437 at 53 | 3L-4L |

# APPENDIX A



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

GEORGE ELWOOD, Administrator of the Estate of Beatrice A. Van Loan,

Plaintiff,

- against -

THE CITY OF NEW YORK,

Defendant.

62 Civ. 2562-CLB

----------X

LLOYD F. CANFIELD and ELOISE L. CANFIELD,

Plaintiffs,

- against -

THE CITY OF NEW YORK,

Defendant.

71 Civ. 5568-CLB

AND 3 OTHER RELATED ACTIONS.
----------X

FINDINGS AND CONCLUSIONS

Brieant, J.

These five actions, consolidated for trial, have been brought by, or in the name of, owners of riparian land situated in Pennsylvania, who claim that the value of their lands along the Delaware River

and its West Branch was diminished by the City of New York's diversion of the headwaters of the Delaware River for public water supply purposes.

The Court has subject matter jurisdiction based upon diversity of citizenship of the parties at the dates of commencement of the actions, pursuant to 28 U.S.C. § 1332(a)(1). Trial was before the Court without a jury, commencing on June 2, 1975. Post-trial briefs, memoranda and submissions of the parties have been read and considered.

The Delaware River

An understanding of the location, design and operation of that portion of the New York City water supply system drawn from the Delaware River is essential to an understanding of this litigation. The Delaware is one of the major rivers on the Atlantic seaboard. From its sources





in New York State to Delaware Bay, the River runs 410 miles, and drains a watershed of some 12,765 square miles. The Delaware River has two main branches, the East Branch and the West Branch. The West Branch rises north of Stamford, New York in Delaware County. The East Branch has its origin near Margaretville, New York. On its way to the sea, the Delaware River is joined by many streams and tributaries.

The two branches join at Hancock, New York. Thereafter, the River flows in a generally southeasterly direction. Commencing near Deposit, New York, the West Branch forms the boundary line between New York and Pennsylvania. At Tri-State Rock, near Port Jervis, New York, the boundaries of New Jersey, New York and Pennsylvania converge. Below Tri-State Rock, the River constitutes the boundary between New Jersey and Pennsylvania. The

Lehigh River joins the Delaware near Easton, Pennsylvania. At the head of Delaware Bay near Wilmington, Delaware, it discharges into the Atlantic Ocean.

Pursuant to proceedings in the Supreme Court, discussed below, the City of New York constructed Pepacton Reservoir, on the East Branch of the Delaware near Downsville, New York. This, and all of the City's reservoirs discussed herein are located entirely in New York State. No part of New York City is located in the drainage basin of the Delaware or any of its tributaries.

Impoundment of water behind the dam erected to create the Pepacton Reservoir began in September 1954; the first diversion to New York City occurred in January 1955; and the dam spilled for the first time on April 16, 1956. Pepacton Reser-





voir is 180 feet deep at its deepest point, and has a capacity of some 147 billion gallons. The drainage area impounded by Pepacton is 371 square miles.

Thereafter, the City constructed Cannonsville Reservoir, on the West Branch of the Delaware near Stilesville, New York. Impoundment at the Cannonsville Reservoir began in September 1963; the first diversion to New York City occurred in January 1964; and that dam first spilled on May 9, 1967. The Cannonsville Reservoir has a maximum depth of 150 feet and a capacity of 97.4 billion gallons. The drainage area impounded by Cannonsville is 450 square miles. On the Neversink River, a tributary of the Delaware, the City also has the older and smaller Neversink Reservoir, impounding a drainage area of 92 square miles and having a maximum storage capacity of 37.1 billion gallons.

The premises of the plaintiffs described below, are all, except for Van Loan, located downstream of the confluence of the West Branch and East Branch of the Delaware, and above the point where the Neversink River enters the Delaware. The Van Loan property is situated upstream from Hancock, near Ball's Eddy, New York, and is affected only by operation of the Cannonsville Reservoir.

Water flows in the Delaware River are affected by the impoundment activities of third parties. Lake Wallenpaupack in Pennsylvania has been dammed by a hydroelectric generating station. It contains a drainage area of 228 square miles, and discharges into the Delaware through the Lackawaxen River at a point upstream from Barryville, New York, and also upstream from the Montague, New Jersey gauging station, mentioned below. As electric





demand varies, the amount of impounded water being released increases or decreases. A similar project on the Mongaup River in New York State has a similar effect. The Mongaup also joins the Delaware above Montague, New Jersey.

All plaintiffs are located upstream from the Lackawaxen, Mongaup and Neversink Rivers. Streamflow in the Delaware at their parcels is not augmented when water is released downstream by the City from the Neversink Reservoir, or by the generation of electric power by unrelated persons on the Lackawaxen and the Mongaup.

The function of the three City reservoirs mentioned above is to impound spring runoff, store it during periods of little or no rainfall, and divert the stored water from the watershed of the Delaware to the Hudson River Valley by means of the Delaware Aqueduct System.

The water is used by the City of New York, and, to a minimal extent, also by other New York communities situated along the course of the Aqueduct. After use, it is discharged into drainage basins other than that of the Delaware River, generally the Hudson River and New York Bay.

The term "diversion" is neutral in the law. It can indicate the perfectly proper "ordinary and domestic uses," York Haven Water & Power Co. v. York Haven Paper Co., 201 F. 270, 275 (3d Cir. 1912), to which every riparian owner can turn the waters of a stream flowing through or at the boundary of his land, so long as he returns the residue to the stream within the boundaries of his land. See, Mayor v. Commissioners, 7 Pa. 348, 367-68 (1847). To be lawful, such uses need only be reasonable. Where, however, a riparian owner's uses of the waters of a stream un-





reasonably deprive a downstream riparian owner of the value of his location, see, Williams v. Fulmer, 151 Pa. 405, 414 (1892), by changing the channel, direction, flow, stage, quality, etc., of the stream -- all of which are summed up in the common law phrase "currere solebat," -- the diversion invades a valuable property right of a downstream owner and is actionable. See, United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 702 (1899); Hackensack Water Co. v. Village of Nyack, 289 F.Supp. 671 (S.D.N.Y. 1968). The permanent massive diversion of water out of a channel for uses outside the drainage area and unconnected with the ownership and use of riparian land, as, for example, to add to the water supply of a community that is not within the drainage area of the stream, is unreasonable. See, e.g., Standard Plate Glass Co. v. Butler

Water Co., 5 Pa. Super. Ct. 563 (1897).

At the present time, New York City relies on three principal sources to meet its water supply needs. The two older sources are the Croton System, on the Croton, Bronx and Byram Rivers, and the Catskill System, on Esopus Creek and Schoharie Creek. The Delaware System, comprising the reservoirs on the East and West Branches and on the Neversink River, is the City's most recent source of supply and provides fully 50% of the City's needs. Since in years of normal rainfall the available water exceeds requirements, the City can and does draw at varying times greater or lesser amounts from its different sources, having regard to operating costs, pending maintenance and repair projects, comparable quality, tastes and odors, and related operating criteria. Because of its larger size, and the rela-





tively smaller human population and industrial activity in the watershed area, Delaware water is regarded as the best quality water presently available from the various City sources. New York chlorinates its supply but has not yet found it necessary to filter or otherwise treat its water, as do most communities.

The Parties and Their Properties

The lands of four of the plaintiffs here are located on the Pennsylvania side of the main body of the Delaware River between Hancock, New York and Narrowsburg, New York. The property of one of the plaintiffs, Van Loan/Elwood, is located on the Pennsylvania side of the West Branch, above Hancock, New York near Ball's Eddy. All are located upstream from Montague, New Jersey, and upstream from the points where the Lackawaxen, Mongaup and Neversink Rivers join the Delaware.

(1) Van Loan/Elwood. Mrs. Beatrice Van Loan was the first of these plaintiffs to commence action against the City. Consequently, the procedural history of her action is the most complex.

Mrs. Van Loan owned 124 acres of land with approximately one-half mile frontage on the West Branch of the Delaware, about five miles above the confluence of the East and West Branches at Hancock, New York. Hers is the only property not located on the main body of the Delaware. She bought the property in 1922, and operated a dairy farm at the time of her death.

On July 23, 1962, she filed her original complaint seeking to enjoin construction of the Cannonsville Reservoir, then being built some 10 miles upstream from her property. She alleged that since no express statutory provision had been made by New York State to compensate





Pennsylvania riparians for the City's damage to riverfront property, the City's action constituted a "taking" without compensation.

By a Memorandum Opinion dated November 14, 1963, the late Judge McLean of this Court dismissed Van Loan's complaint as premature, since the Cannonsville Dam had not yet been completed and would, when complete, cause no injury for which money damages would not be adequate compensation. Judge McLean granted leave to amend the complaint when the dam was completed.[1/]

Mrs. Van Loan died testate in May 1965. By a Memorandum Decision dated May 31, 1966, Judge Wyatt of this Court allowed the filing of an amended complaint by George Elwood, the ancillary administrator d.b.n., c.t.a. of Mrs. Van Loan's Estate, who had been appointed after the resignation of the named executor. The amended

complaint was filed on May 4, 1966.

On November 12, 1966, the administrator sold the Van Loan property at auction for $15,200.00. Title was conveyed on February 23, 1967. The administrator's deed expressly reserved all rights against the City of New York, for past or future damages or the taking. The Deed (Ex. 39) reads in relevant part as follows:

> "ALSO EXCEPTING AND RESERVING unto the seller, the heirs, legatees and devisees of the Beatrice VanLoan Estate or their assigns, a claim or claims against the City of New York arising out of and by reason of rights heretofore acquired and to be acquired in connection with the past and future diversion of the West Branch of the Delaware River which has already and will cause a decrease in the market value of the real estate being sold, and for business damages heretofore incurred, and all aspects thereof."

For a discussion of the effect of this Reservation of rights see text infra, pp. 52-53.





On August 7, 1967, Judge Bonsal of this Court denied cross-motions for summary judgment in the Van Loan/Elwood action, holding that apparent disputed factual issues were present. Elwood v. City of New York, 271 F.Supp. 62 (S.D.N.Y. 1967).

By a Memorandum Decision dated March 27, 1973, Judge Pierce of this Court dismissed the Elwood complaint for failure to allege the filing of a Notice of Claim pursuant to New York General Municipal Law §§ 50-e and 50-i. However, in light of plaintiff's claim of a continuing trespass, leave to amend the complaint on filing of a Notice of Claim was granted. The Court noted that "the initial period of the claim would be limited by this late filing to encompass trespass only up to 90 days before the notice of claim was filed," citing Hackensack Water Co. v. Village of Nyack,

289 F.Supp. 671 (S.D.N.Y. 1968).

Elwood filed his Notice of Claim on April 24, 1973, and on June 11, 1973 filed his amended complaint.

(2) Badgley. Mrs. Lillian Badgley commenced her action against the City on July 15, 1966. In 1958 she and her husband had purchased approximately two acres of land with 530 feet of River frontage on the main body of the Delaware River just above the Lake parcel. They paid $22,500.00 for the property and she claims to have made some $40,000.00 worth of improvements on the property in order to make it into a resort. Her husband, Foster Badgley, died in 1965, and as a result, title vested in her. She has since remarried, to one Dixon, but retains title to the property in her prior name.

Mrs. Dixon filed her Notice of Claim against the City on May 24, 1972.





On March 22, 1973, on the City's motion in Lake, Badgley and in a third case, Duryea Pine Flats Hunting Lodge, 66 Civ. 2151, which is no longer pending,[2] this Court issued a Memorandum Decision dismissing the complaints with leave to amend the complaints to include proper allegations of filing the required Notices of Claim.

That decision held that, although the plaintiffs could not avail themselves of Title K of the Administrative Code of the City of New York,[3] and although, for the reasons therein stated, they had suffered no extraterritorial "taking" of their Pennsylvania property by the City of New York, they were entitled to pursue their actions for a continuing trespass, and to recover "damages not only to the date of judgment, but for anticipated future injury to the property during the foresee-

able life of the diversion works, or in perpetuity." Id. at 4.

Decision was reserved on the question whether, under Pennsylvania law, "one who conveys title may reserve to himself [in his deed of conveyance] the right to assert a claim for a permanent continuing trespass in futuro," but I rejected the City's defenses based on the interstate allocation of the waters of the Delaware River:

> "Nothing is found in New Jersey v. New York, 347 U.S. 995 (1954), or in the Delaware River Basin Compact, as approved in Pub. Law 87-328, or in any Pennsylvania statute enacted pursuant thereto, which implies otherwise." Id. at 10.

An amended complaint in Badgley was filed thereafter, on April 25, 1973.

(3) Lake. Emil and Helen Lake filed their complaint against the City on July 15, 1966. At that time they owned





some 15 acres, bought in 1945 and 1951 for approximately $4,200.00, with 600 feet of frontage on the main body of the Delaware just upstream from the Gregory parcel, described below.

On September 27, 1968 the Lakes sold their property for $18,500.00. By recital essentially the same as that found in the Elwood/Van Loan deed, they reserved all rights against the City of New York.

On May 23, 1972, alerted by the pending City motion to dismiss in Gregory v. City of New York, supra, the Lakes filed the Notice of Claim required by the General Municipal Law, and amended their complaint on April 4, 1973.

(4) Gregory. George and Helen Gregory commenced their action against the City of New York on July 15, 1966. They are New Jersey residents, who, in 1960, purchased 124 acres of riparian land

in Pennsylvania with some 4,000 feet of frontage on the Delaware River. They paid $20,000.00 for the property, which included at the time of purchase a house, barn, sauna and four cottages. Between 1964 and the time of trial they sold some 34.5 acres of their land, including 3,323 feet of River frontage, for $48,900.00, and retained at the time of trial some 89 acres and 750 feet of frontage. The Gregory parcel is located some 39 miles downstream from the Pepacton Reservoir, and 22 miles downstream from the Cannonsville Reservoir.

In a prior decision [Gregory v. City of New York, 346 F.Supp. 140 (S.D.N.Y. 1972)], familiarity with which is assumed, this Court held that the Water Supply Act, Title K, Chapter 51 of the Administrative Code of the City of New York, which prescribes a procedure by which owners can be





compensated for the City's impairment of their riparian rights, was not available to holders of property in Pennsylvania, but that both New York and Pennsylvania law provided a cause of action to recover damages, if any, resulting from the City's continuing trespass. However, the original Gregory complaint was dismissed because of the plaintiffs' failure to file the Notice of Claim required by Sections 50-e and 50-i of New York's General Municipal Law. Plaintiffs were granted leave to file the Notice, and thereafter, an amended complaint alleging a continuing trespass to their rights as riparians to the extent not time barred. On May 25, 1972, these plaintiffs filed their Notice of Claim, and on July 27, 1972, filed an amended complaint demanding $50,000.00 damages for the City's continuing trespass.

The claims alleged in the Gregory's amended complaint are typical of those made by all plaintiffs in this consolidated action, and are as follows:

> "That by reason of the aforesaid diversions of the [Delaware] river and the trespasses by the defendants herein and absence of water in said river at the plaintiff's premises downstream therefrom, and the permanence of said diversion and of said trespasses and past, present and future operation by the City of New York of said dams at Cannonsville and Downsville, and the said Pepacton and Cannonsville Reservoirs, the said river has and will become a swamp, fishing therein has [been] and will be destroyed, and the river will become oderiferous, unsightly, and will be unable to provide plaintiff's property with ground water and surface water, will decrease the fertility of said property, will make such property unsuitable for recreational purposes, all of which has and will greatly decrease the market value of the plaintiff's property and cause damage thereto by reason of the foregoing and other effects of said diversions and trespasses too numerous to mention, all to the plaintiff's damage ...." [¶ 9, matter in brackets added.]





(5) Canfield. Lloyd and Eloise Canfield filed their complaint against the City on December 22, 1971, at which time they owned 166 acres on the main body of the Delaware with about 6,700 feet of River frontage. Their Notice of Claim against the City was filed on October 20, 1971, and was properly pleaded in their complaint.

In 1954 Canfield acquired title to the property, then consisting of 278 acres, for $5,000.00 from his half brother, Grant Lee Canfield, a minor under the age of 14 years. This was accomplished through a judicial proceeding in a Pennsylvania court in which the Wayne County Savings Bank as guardian of the Estate of Grant Lee Canfield, sold the premises to these plaintiffs for $5,000.00.[4/]

The Court has visited each of the premises affected by this litigation and

has made a personal inspection thereof in the presence of counsel for all parties. The price of $5,000.00 paid for the Canfield property, even in 1954, could not be, and is not regarded as reflecting an arms length sale. The price which a fully informed seller under no necessity of making a prompt sale would receive from an unrelated purchaser, in an arms length sale would be much larger.

In a Memorandum Decision dated May 11, 1972, Judge Tenney of this Court denied the City's motion to dismiss the Canfield action, holding that the plaintiffs had a cause of action for a continuing trespass, and that the measure of damages for such trespass was the same as that provided in Title K of the Administrative Code of the City of New York, to wit: the difference between the market value of the property with the City's diversion of





the stream and the market value without such diversion.

Class action status was denied in the Canfield case after the decision of the Supreme Court in Zahn v. Int'l. Paper Co., 414 U.S. 291 (1974). The Canfields had participated unsuccessfully in the Zahn case as amicus curiae favoring plaintiff Zahn's position. They had planned to assert the interest of all downstream owners adversely affected by the diversion. Some part of the delay in the case arose while the parties awaited the resolution of the Zahn class action issue.

Proceedings Affecting the Delaware River; The River Master

Beginning in 1929, the City of New York planned the diversion of the Delaware River and its tributaries to meet the increasing municipal water supply needs of the City, and other municipalities dependent on the City for all or part of such supply.

To restrain this proposed diversion, the State of New Jersey began an original suit in the Supreme Court against the State of New York and the City. Pennsylvania intervened to protect its own sovereign interests in the Delaware River. New Jersey v. New York, 283 U.S. 336 (1931).

The Supreme Court found the River and its tributaries "a necessity of life [to] be rationed among those who have power over it," id. at 342, and applied the federal common law doctrine of equita-





ble apportionment, to allow the City to divert from the Delaware watershed up to 440 million gallons of water a day, provided certain stream management conditions were met. Principal among these was the requirement that a sewage treatment plant be constructed at Port Jervis, New York, to lessen the accumulated pollution present in the diminished downstream flow of the River. A constantly maintained flow of .50 c.s.m. (1,535 c.f.s.) was also required to be maintained at Montague, New Jersey, just below Port Jervis.

The Supreme Court retained continuing jurisdiction over its equitable decree in order to adjust the rights of the parties as equity might require in the future. The Court explicitly held that the diversion should "not constitute a prior appropriation, and shall not give

the State of New York and City of New York any superiority of right over the State of New Jersey and Commonwealth of Pennsylvania in the enjoyment and use of the Delaware River and its tributaries." Id. at 347.

Until 1953, when the Neversink Reservoir was completed, the City did not avail itself of its right under this decree to withdraw 440 m.g.d. from the Delaware and its tributaries. The Neversink is tributary to the Delaware at a point downstream from the properties which are the subject of this suit. These plaintiffs were not affected by the diversion of water from the Neversink. Those waterworks are involved here only insofar as releases from Neversink Reservoir form one element contributing to the combined minimum flow that must be maintained at Montague, New Jersey under the Supreme





Court's revised Decree of 1954. For a discussion of compensation of riparians on the Neversink River, see In re Ford (Whitton), 35 App.Div.2d 626 (3d Dept. 1970). All such properties are in New York State.

In 1952, the City, with the approval and support of New York State, petitioned the Supreme Court for a modification of the 1931 Decree which would allow additional diversions of water from the Delaware by means of proposed dams at Cannonsville and Downsville (Pepacton) New York. The petition was allowed. New Jersey v. New York, 343 U.S. 974 (1952). A motion by the City of Philadelphia to intervene in the proceedings to protect its interests in the River was denied on the finding that its rights were "invariably served by the Commonwealth's [i.e., Commonwealth of Pennsylvania's] position."

345 U.S. 369, 374 (1953).

In 1954, the Supreme Court modified and superseded its 1931 Decree. 347 U.S. 995 (1954). Under the terms of the new Decree, the City was allowed to continue the diversion of 440 m.g.d. from the Delaware and its tributaries until the completion of the Pepacton Reservoir then under construction on the East Branch, at which time it could begin to divert 490 m.g.d., subject to a requirement of maintaining a flow of 1,525 c.f.s. at Montague, New Jersey. After the completion of the Cannonsville Reservoir on the West Branch of the Delaware, the City was authorized to divert the full amount of 800 m.g.d. on a cumulative average basis, subject again to the requirement of maintaining a minimum flow of at least 1,750 c.f.s. at Montague, New Jersey.

In addition to the aforementioned





minimum flow requirement at Montague, New Jersey, the City is also required to release an "excess release quantity" of its impounded water into the Delaware. Essentially, this is a device to enable the City gradually to adapt to increased demands for water. On the first day of each calendar year, the City is required to make an estimate of its total annual consumption of water from all sources (excluding pumping) for the next year. This estimate is based on the maximum consumption for any previous year plus an annual increment of 7.25 billion gallons. The City is then required to release over any 120 day period after the fifteenth day of June of each year, an additional amount of water into the Delaware equal to 83% of the amount by which its estimated consumption and yearly increment exceed 1,665

m.g.d. (the City's minimum "safe yield" from all sources, excluding pumping, as determined by the Supreme Court). In no calendar year is this "excess release quantity" of water so computed required to exceed 70 billion gallons, and the City is never required to maintain a flow at Montague, New Jersey greater than 2,650 c.f.s. Since 1968, as New York City's consumption has increased, this "excess release quantity" has steadily diminished. At the time of trial, the flow at Montague, New Jersey was being maintained at approximately 2,000 c.f.s.

Under the system of stream management established by the Supreme Court, any daily diversion, no matter how large, is permitted from any one or all of the three reservoirs (Pepacton, Cannonsville and Neversink) so long as the required minimum flow at Montague, New Jersey is main-





tained, and so long as the quotient of the total amount of water diverted that year, divided by the number of days of the year to that date, does not exceed 800 m.g.d., and so long as it satifies the "excess release quantity" provision.

In its 1954 Decree, the Supreme Court appointed a River Master, the Chief Hydraulic Engineer of the United States Geological Survey, to oversee and implement the Decree. It is the River Master's duty to require the City to maintain the required flow at Montague. Under the Decree, the City is not required to make any releases of impounded water unless and until the River Master calls for them. On at least one occasion, during the drought in June 1965, the City has refused to comply with the River Master's requests for increased flow.[5/]

Under the provisions of the revised Decree, the Supreme Court continued to retain jurisdiction over the controversy. 347 U.S. at 1005. The City has a continuing equitable duty to develop its available sources of water to meet its increasing needs, by the construction of additional impoundment and storage facilities, and by developing those other sources, including the Hudson River, directly available to it, and can be required to do so by the Supreme Court. All parties have assumed, correctly, that in times of unusually high consumption, drought, fires or similar situations of short or long duration, the City would discharge its obligations to the public consumers of water prior to performing its duties owed under the Decree to downstream communities and riparian owners. When and how





often in the future the City, will refuse ex necessitate to comply with the River Master's requests presents a question which is primarily speculative, but plaintiffs and the Court must assume that such occasions will arise again during the existence of these Dams, as happened in 1965.

A more serious and recurring problem with this regulatory scheme from the point of view of these plaintiffs is that the River Master is unconcerned, nor is he required to be concerned, with the sources of the required minimum flow at Montague. In planning how to assure the daily flow at Montague, the River Master must and does take into account the anticipated releases resulting from electric power generation on the Mongaup and the Lackawaxen (Lake Wallenpaupack), described supra, p. 4.

These electric generating utilities each make independent determinations as to the amount of water which will be discharged. Such determinations are based only on the economics of the electric generating activities of the utility, and the demand for power. The amounts of such discharges are unpredictable, and vary significantly from day to day. There is no provision in the Delaware River Compact or the Supreme Court's Decree by which the River Master can require the power plant operators to make any minimum release from impounded water on any particular date, in addition to that needed for power generation. Presumably, provisions authorizing any such direction would require compensation to be made to the power plant owners.[6/]





Uncontradicted testimony at trial showed that the River Master has relied increasingly over the years on these power plant releases to make up the required flow at Montague. Only when the projected run-off of all upstream tributaries and the projected releases of the two power plant reservoirs are anticipated to produce less than the minimum required flow at Montague Gauging Station does the River Master call on the City for net releases from its dams. These demands, in a typical year, range from zero to as much as 1.5 billion gallons on a given day.

Once a demand has been made upon the City for releases to maintain the required flow at Montague, the City is faced with a choice of three reservoirs (Cannonsville, Pepacton, Neversink) from any or all of which it may make the required re-

leases in whole or in part.

The testimony of the City's expert witness, Mr. Paul Blomquist, former head of the Bureau of Claims of the Board of Water Supply for the City, establishes the existence of a general policy of the City to make major releases through the Cannonsville dam because of its greater release capacity (2,440 c.f.s., as compared with 760 c.f.s. from the Pepacton Reservoir).[7/]

On numerous occasions these releases from the Cannonsville Reservoir into the West Branch have amounted to approximately One Billion Gallons during a day.

A second decision facing the City is the time span within which to make its required releases. The River Master requires only an <u>average</u> daily flow at Montague, and it is within the discretion of the City to release the required





amounts over the whole 24-hour period, or in some shorter time. No evidence was introduced, however, which would indicate that such precipitous releases have ever been made by the City.

The final element affecting the flow of water in the River is the "conservation releases" that the City is required by order of the New York Supreme Court to make daily from each of its reservoirs releasing into the Delaware River. Such releases must be made independently of any called for by the River Master, but they are taken into consideration by the River Master in projecting the flow at Montague. The Cannonsville Reservoir is required to release 15 m.g.d. during the summer (April 16th through November 30, inclusive) and 5 m.g.d. during the winter (December 1st through April 15th, inclusive); the Pepacton

Reservoir is required to release 12 m.g.d. during the summer (April 8th through October 31st, inclusive) and 4 m.g.d. in the winter (November 1st through April 7th, inclusive). These figures were arrived at on the basis of pre-diversion low flows in the West and East Branches, and were ordered in order to maintain the environmental quality of the River. It has frequently happened that these "conservation releases" were, over extended periods of time, the only waters released into the Delaware River from the City's reservoirs. The right to have such "conservation releases" continued into the indefinite future is, of course, not graven in stone, nor do these plaintiffs have any vested property right in their perpetuation.

All the City's dams release water into the Delaware River from spillways or





outlets at the bottom of the dam.

Because the required minimum flow is implemented at the Gauging Station at Montague, New Jersey, downstream from Port Jervis, when the River Master calls upon the City to release water from its various impoundments, he does so based only on the flow at Montague, and makes no specification as to the facility from which the City shall make the required releases.

As a result, the flow of water past plaintiffs' premises on any given day is not directly assured by provisions of the Decree and of the Compact, all of which are directly related to the flow at Montague, New Jersey, affected in great degree by power company releases and Neversink releases, which, as noted, enter the Delaware upstream of Montague, but downstream from plaintiffs' properties. The various facilities, drainage areas and

their relative locations with respect to each other and the plaintiffs' premises are all set forth in Defendant's Ex. A.

The Delaware River Compact and New York's Environmental Conservation Law

In 1961, all of the states touching on the Delaware River and affected by its flow entered into an Interstate Compact, with the approval of Congress, creating a Commission to regulate all diversions of water from the Delaware. Pub.L. No. 87-328, 75 Stat. 688 (1961). Section 3.5 of the Compact specifically prevented the Commission from impairing rights created by the Decree in New Jersey v. New York in 1954, except by the unanimous consent of the parties to that Decree. Under section 3.4, the parties relinquished, with certain immaterial exceptions, their rights to apply to the Supreme Court for a modification of the 1954 Decree.





On July 27, 1976, without consultation with the other signatory parties to the Compact or with the parties to the 1954 Supreme Court Decree, New York enacted an amendment to Title 15 of the New York Environmental Conservation Law, entitled "Regulation of Reservoir Releases." Although this occurred after the trial in this matter, the record in the case was re-opened and a hearing held on September 14, 1976, in order to consider the effect, if any, of the new statute.

The legislative findings accompanying the amendment are in relevant part as follows [matter in brackets added]:

> "[T]he legislature hereby finds that the volume and abrupt changes in the volume of releases of water from impounding reservoirs of water having a capacity of more than one billion gallons [including the Cannonsville and Pepacton Reservoirs] and located in the counties of Delaware, Greene, Putnam, Schoharie, Sullivan, Ulster and Westchester have damaged the re-

> creational uses, such as trout fishing and canoeing, of waters affected by such releases, that such waters are a recreational resource for residents from all parts of the state of New York and elsewhere, that such recreational resource benefits the economy and welfare of this state and that the volume and rate of change of volume of such releases can be regulated to protect and enhance the recreational use of waters affected by such releases while ensuring and without impairing an adequate supply of water for power production or for any municipality which uses water from such reservoirs for drinking and other purposes." (N.Y. Envir. Conserv. L. § 15-0801).

Under the provisions of the law, the New York Commissioner of Environmental Conservation is empowered to promulgate rules regulating the "volume, timing and rate of change in volume of releases of water" from impounding reservoirs in order to achieve the purposes of the Act. Id. § 15-0805(2).

The new statute is silent on the effects, if any, of the 1954 Supreme Court





Decree or the Interstate Compact on the Commissioner's powers.

In late 1976, at the request of the Supreme Court, the parties to the 1954 Decree submitted memoranda concerning the effect, if any, of the New York legislation on that Decree. In its Memorandum, the State of New York concedes, as it must, that "the new law cannot legally conflict with the Decree, [and consequently] must be enforced so as to dovetail directly with the Decree." Memorandum at p. 7. The proposals for regulations submitted to the Commissioner by the State incorporate this principle. Id.

By a letter of January 22, 1977, the Clerk of the Supreme Court advised the River Master that the Court contemplated no further action in the matter.

In June 1977, the parties to the

1954 Decree signed a Memorandum of Agreement stipulating to a two-year redistribution of the "annual excess quantity" commencing on June 1, 1977. The River Master approved this Agreement on July 7, 1977.

Under the provisions of the June 1977 Agreement, the Pepacton Reservoir must release 70 c.f.s. of water each day from April through October of each year, and 50 c.f.s. daily from November through March. The Cannonsville Reservoir must release 45 c.f.s. daily from April 1st through June 14th; 325 c.f.s. daily from June 15th through August 15th; 45 c.f.s. daily from August 16th through October 31st; and 33 c.f.s. daily from November 1st through March 31st, each year. In addition, at times and from reservoirs to be determined by the State of New York, an amount not to exceed 6,000 second-





foot-days per year must be released. The stated purpose of the releases is to prevent, as far as possible, the water temperature of the Delaware from exceeding 75° F., as measured at Callicoon, New York.

This Agreement between the parties to the 1954 Decree obviates, at least until its expiration in May 1979, any possible conflicts between the New York legislation and the Supreme Court Decree. In essence, the Agreement merely redistributes the "excess release quantity" on a daily basis, rather than over a 120-day period. The schedules governing the releases will be met only "to the extent the annual excess quantity will permit ...." Memorandum of Agreement at 2. Over the year, no quantity of water will be released into the Delaware greater than the

amount which would have been released under the superseded system. Furthermore, it is implicit in the regulatory scheme that any excess releases are subject to the paramount needs of the City's water consumers in the event of extreme drought and/or temporary failure of the Croton or Catskill systems.

On November 2, 1977, the Commissioner of Environmental Conservation issued the regulations required by section 15-0805 of New York Environmental Conservation Law. 6 N.Y.C.R.R. Part 671.1. The regulations establish a two-year experimental program running concurrently with, and exactly duplicating the provisions of the June 1977 Memorandum of Agreement entered into between the parties to the 1954 Supreme Court Decree. The results of this experimental program, in turn, will "provide a basis for determining the





manner such [reservoir] releases should be regulated on a long-term basis." 6 N.Y.C.R.R. § 671.1.

These regulations also specifically preserve all rights established under the Supreme Court's Decree, and set the maximum quantity of water to be released yearly under the regulations as the sum of (1) the releases necessary to maintain a flow of 1,750 c.f.s. at Montague, New Jersey, (2) the court-ordered conservation releases; and (3) the "excess quantity" releases required by the 1954 Decree. 6 N.Y.C.R.R. § 671.8.

In essence, the new regulations and the June 1977 Memorandum of Agreement merely provide for a more rational distribution of excess water already required to be released. As we discuss, infra pp. 45-51, a substantial item of damage resulting to plaintiffs from the City's

impoundment and diversion activities on the Delaware and its tributaries is caused by (1) a marked change (decrease) in the average stream temperature of the water, compared to that found prior to the activities complained of; and (2) drastic fluctuations during the summer months occurring as the City makes sudden releases of water from the colder, bottom levels of its dams.

The long-term effect of these releases on ameliorating this situation with respect to water temperatures on the Delaware River is speculative at best. The City has consistently maintained, both before the Commissioner of Environmental Conservation and in this Court, that any requirement in future permanent regulations that quantities of water be released in excess of those ordered by the





River Master would conflict with the 1954 Supreme Court Decree. The City points to the River Master's power over the "supervision and direction" of releases, New Jersey v. New York, 347 U.S. 995, 997 (1954), and to the fact that releases in excess of those required by the River Master have in fact never been made by the City. For our purposes we concur in the validity of the legal position taken by the City, namely that the scheme of river regulation found in the Supreme Court Decree as amended is paramount. While a municipal corporation enjoys no rights under the Fourteenth Amendment against the state which created it, there are probably intervening rights of individual and corporate water users in the City which would be protected in a proper case, arising out of the Supreme Court

Decree.

Plaintiffs' Property Rights Under Pennsylvania Law

In prior decisions in these cases it has been consistently held that under Pennsylvania law riparian property owners enjoy rights in the natural flow of their adjacent streams, for injury to which they are entitled to bring an action for a continuing trespass. Familiarity with these prior holdings is assumed. Because the City has argued at length that all of the cases relied on in prior decisions involve riparian rights on non-navigable rivers, the Court will consider the issue further.

Under our diversity jurisdiction, we are bound here by New York choice-of-law rules. Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941);





Rosenthal v. Warren, 475 F.2d 438 (2d Cir.), cert. denied 414 U.S. 856 (1973). Under the New York conflicts rules, when, as is the case here, the property against which the tort was committed is located in Pennsylvania, and the last act necessary to complete the tort (i.e., the damage) occurred there, the law of Pennsylvania regulates the property rights of the plaintiffs, and defines the tort against those rights. It also determines the recovery. This is so whether the older lex loci delicti rule or the more current "center of gravity" or "grouping of contacts" theory is applied. See, Babcock v. Jackson, 12 N.Y.2d 473 (1963); Conklin v. Canadian-Colonial Airways, 266 N.Y. 244, 248 (1935).

Under the common law of England as applied in most of the states on the

Atlantic seaboard, the holder of lands adjacent to a fresh-water stream, no matter what its size, was presumed to hold title to the stream and its bed ad medium filum aquae (to the center thread of the waters). Such riparian holders accordingly possessed certain extraordinary rights in the stream, such as the right to an exclusive fishery. See generally, Attorney-General v. Philpott (1632) [unreported, but discussed in Attorney-General v. Richards, 145 Eng. Rep. 980 (Ex. 1795)]; S. Moore, A History of the Foreshore and the Law Relating Thereto, 896-907 (3d ed. 1888); Fraser, Title to the Soil under Public Waters--A Question of Fact (pts. 1-2), 2 Minn. L. Rev. 313, 429 (1918).

The contrary presumption prevailed when lands adjoined tidal waters. The holders of such lands were presumed to





hold only to the line of mean-high water. See generally, Dolphin Lane Associates, Ltd. v. Town of Southampton, 37 N.Y.2d 292 (1975); Deveney, Title, Jus Publicum, and the Public Trust: An Historical Analysis, 1 Sea Grant L. J. 13 (1976).

Both of these presumptions were phrased in terms of "navigability": tidal water was by definition "navigable," and fresh water "non-navigable."

This legal system was poorly suited to America, with its great coastal rivers, and historical practice of using mountain streams for driving logs. Accordingly, several states, including Pennsylvania, adopted the rule of the civil law according to which title to lands adjoining rivers which were navigable-in-fact extended only to the line of high or low water, rather than to the thread of the stream. See, Rundle v. Delaware & Raritan

Canal Co., 55 U.S. 79, 90-91 (1852); 3 Kent's Commentaries *430-31 (12th ed. 1873).

It is settled under Pennsylvania law that the main body of the Delaware River is navigable-in-fact. See, Rundle, supra; Fulmer v. Williams, 122 Pa. 191, 15 A. 726 (1888); Carson v. Blazer, 2 Binn. 475 (Sup. Ct. Pa. 1810). Under the criteria there set forth, as well as under the commonly accepted and applied federal criteria, it is clear, and I so find, that all of the sections of the Delaware River relevant to this case, including the West Branch adjacent to the Van Loan/Elwood property, are navigable-in-fact. See, e.g., The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).

The Van Loan/Elwood property is located near Ball's Eddy, less than five miles above the confluence of the East and West Branches of the Delaware. In the last





century, considerable rafting of lumber was done between Hancock, New York and Deposit, New York on the West Branch, and at the time "Ball's Eddy was said by some to be the rafting center of the West Branch of the Delaware, and more timber was reported rafted from [there] than any other one point along this branch." Leslie C. Wood, Rafting on the Delaware River, 179 (Livingston Manor, N.Y. 1934). See also, Report of the Special Master at 83, and Finding of Fact No. 25, at 203, affirmed by the Supreme Court, New Jersey v. New York, 283 U.S. 336 (1931).

Under Pennsylvania law, title to lands adjoining navigable waters runs to low-water mark, with the lands between high and low-water mark being subject to the public's superior right of navigation and fishery. See, Pa. Act of June 25, 1937, P.L. 425 (1937); Shaffer v. Baylor's

Lake Association, 392 Pa. 403, 141 A.2d 583, 585 (1958); Monongahela Bridge Co. v. Kirk, 46 Pa. 112 (1863); Bailey v. Miltenberger, 31 Pa. 37 (1856); Shrunk v. Schuylkill Navigation Co., 14 S. & R. 70, 78-79 (Sup. Ct. Pa. 1826); 3 Kent's Commentaries *427(d) (12th ed. 1873).

Basing its arguments on this rejection by Pennsylvania of the common law doctrine of title to mid-stream on non-tidal rivers, the City has argued that Pennsylvania has also rejected the entire common law doctrine of riparian rights on such waters, and consequently plaintiffs have no rights against which a trespass could be committed.

There is no doubt that some riparian rights held at common law are not possessed by riparian holders on the Delaware River. See, e.g., Shrunk v. Schuylkill Navigation Co., supra and Carson v.





Blazer, supra, which deny such holders an exclusive right of fishery.

The majority of cases referred to by defendant, however, are based on the unquestioned fact that riparians on navigable water in Pennsylvania do not hold title to the water itself, and may use it, for example, as a source of power, only at the will of the state. See, e.g., Rundle v. Delaware & Raritan Canal Co., 55 U.S. 79 (1852); Susquehanna Canal Co. v. Wright, 9 Watts & S. 9 (Sup. Ct. Pa. 1845); Monongahela Navigation Co. v. Coons, 6 Watts & S. 101 (Sup. Ct. Pa. 1843). These cases are totally inapposite here, however, both because they relate to the absolute ownership of the water of a navigable stream--which is not in contention here--and because they are uniformly based on the Commonwealth of Pennsylvania's superior right

to control the flow of streams in aid of navigation. Moreover, even these cases relied on by defendant do not purport to exclude all riparian rights along navigable streams. See, e.g., Mayor v. Commissioners, 7 Pa. 348, 367-68 (1847), which holds that a riparian owner on the navigable Schuylkill River retains the right to reasonable diversion and use of the stream.

At common law, every riparian enjoyed the right to have the stream flow as it was wont to flow:

> "The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream. It is enough, without other citations or quotations, to quote the language of Chancellor Kent, 3 Kent Com. § 439:
>
> 'Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (currere solebat) without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. Aqua currit et debet currere ut currere solebat is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate.'" United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 702 (1899) (emphasis added).

The Pennsylvania courts have frequently affirmed this common law doctrine of riparian rights in relation to non-navigable streams. See, e.g., Scranton Gas & Water Co. v. Del. L. & W. R.R. Co., 240 Pa. 604, 88 A. 24 (1913); James v. West Chester Borough, 220 Pa. 480, 69 A. 1042 (1908); Lord v. Meadville Water Co., 135 Pa. 122, 19 A. 1007 (1890). They have just as frequently made it clear that,

except for exclusive fisheries and rights based on actual possession of the water of a stream, the riparian on navigable waters in Pennsylvania possesses the same rights as a riparian on non-navigable waters.

In Williams v. Fulmer, 151 Pa. 405 (1892), the defendant, an upper riparian owner on the navigable Lehigh River, diverted the stream from plaintiff's dam and defended his actions with much the same contentions as those made here by the City of New York. The Court held that the right to the water power itself had been granted by the Commonwealth exclusively to a third party, "but that the plaintiff was nevertheless entitled to recover for any injury he had sustained by reason of the diversion of the stream from its natural channel along the front of his





land ...." Id. at 413.

> "[Plaintiff] was the owner of land lying upon a navigable stream. The advantages of his location were inseparable from the ownership of the land, and if they increased its desirability or added to its value for purposes of business or of pleasure they were his property as truly as the land itself.
>
> The diversion of the stream was an injury to his land that was direct, peculiar, and not shared with the general public. It was as clearly actionable as the diversion of a stream passing over his land. Whoever brought about such diversion so as to deprive him of the advantages of his location, whatever they were, inflicted a pecuniary wrong upon him. The manner in which the diversion is brought about is not important .... The lower riparian owner would be deprived of the natural advantages which ownership of the land at that point gave him, by the unlawful act of another; and he would have a right to call upon the wrongdoer to repair the wrong done him by restoring the stream to its channel or making compensation for its loss." Id. at 414. (Emphasis added.)

See also, City of Philadelphia v. Commonwealth, 284 Pa. 225 (1925); Citizens Elec-

tric Co. v. Susquehanna Boom Co., 270 Pa. 517 (1921); 39 Pennsylvania Law Encyclopedia, Waters § 219 (1961).

The Third Circuit has summarized Pennsylvania's position on the riparian rights of holders of land on navigable waters:

> "The ordinary rights of the owner of lands along which or through which a nonnavigable stream passes, have been long settled and are well understood. Such owner may use a stream thus flowing for his ordinary and domestic uses, or for any extraordinary purposes, so long as such extraordinary use does not interfere with the rights of others along or through whose lands the stream flows. These rights are incident to the lands in contact with the stream. They pass with the land and do not exist except in relation thereto. Enjoyment of such rights, in whole or in part, however, may be granted by the owner of the land to another, but the grantee has no property therein, and the stipulated enjoyment is only enforceable against the grantor.
>
> The rights of riparian owners on navigable streams are essentially





> of the same character. Generally, they consist of right of access to the stream, as a public highway, and to such use of the water and the flow thereof as will not interfere with the public rights of navigation. There are other subordinate rights, such as the right to wharf into the stream, so far as it may not interfere with the rights of others or with public navigation; the rights of fishery, etc. These rights, which may be called the natural rights of a riparian owner, are incident to the ownership of the land bordering upon the stream, whether navigable or not, and pass to the grantee of such lands without special mention in the deed of conveyance. If notoriously navigable, or declared to be so by legislative enactment, these natural rights are restricted so far as to exclude the right to any serious diversion of the water, by damming or otherwise. On such streams or rivers, the right to dam for milling purposes must be conferred by an exercise of the legislative will amounting to a license." York Haven Water & Power Co. v. York Haven Paper Co., 201 F. 270, 275-76

Accordingly, I find that these Pennsylvania plaintiffs were possessed of all the rights of riparians at common law,

except for those rights, such as exclusive fishery and title to the bed and flow of the stream, that had been excluded by Pennsylvania's modification of the common law.

Most important of these rights was the right to the full natural flow of the Delaware River, both for commercial and recreational purposes, aqua currit et debet currere ut currere solebat. Included in the concept of natural flow is not only the right to an undiminished flow of the stream [Clark v. Pennsylvania R. R. Co., 145 Pa. 438, 22 A. 989 (1891)], but also the right to be free of unreasonable increases or fluctuations in the flow, Kauffman v. Griesemer, 26 Pa. 407 (1856); Miller v. Miller, 9 Pa. 74 (1848); Standard Plate Glass Co. v. Butler Water Co., 5 Pa. Super. Ct. 563 (1897), and incidental rights, such as the right to a water-





table maintained at its natural level. Craig v. Shippensburg Borough, 7 Pa. Super. Ct. 526 (1898).

We have not been cited to, nor able to find a Pennsylvania case directly ruling on the sort of thermal pollution of water involved here, but I believe that the common law of Pennsylvania includes a right to be free from such pollution and from unreasonable fluctuations in water temperature which cause actual damage. A district court sitting in diversity must determine the common law of a state by examining the rationale for a given rule, developments in other states, and analogous areas of other states' law. See, Bernhardt v. Polygraph Co. of America, 350 U.S. 198 (1956). Here, the right claimed exists in other jurisdictions, and presumably would be recognized by Pennsylvania's highest Court if the situation

were to arise. See, Sandusky Portland Cement Co. v. Dixon Pure Ice Co., 221 F. 200 (7th Cir.), cert. denied 238 U.S. 630 (1915).

For a trespass against these riparian rights, in this case a continuing trespass with permanent damage, a cause of action for damages exists under Pennsylvania law. See, Gregory v. City of New York, 346 F.Supp. 140, 144 (S.D.N.Y. 1972); Elwood v. City of New York, 271 F.Supp. 62 (S.D.N.Y. 1967); Cochran Coal Co. v. Municipal Management Co., 380 Pa. 397, 110 A.2d 345 (1955); Clark v. Pennsylvania R. R. Co., 145 Pa. 438, 22 A. 989 (1891); Lord v. Meadville Water Co., 135 Pa. 122 (1890); Craig v. Shippensburg Borough, 7 Pa. Super. Ct. 526 (1898).

Finally, plaintiffs' rights here are not subject to or diminished by any





correlative riparian right of the City to reasonable use of the waters of the Delaware. The Special Master appointed in 1930 in New Jersey v. New York found that the City is not riparian to the Delaware or its tributaries. Report of the Special Master at 36 (1931). Even if the City were a riparian owner, however, its diversion of such enormous quantities of water from the River and out of the Delaware watershed is unreasonable. See, Scranton Gas & Water Co. v. Delaware, Lackawanna & Wester R. R., 240 Pa. 604 (1913); In re Haupt's Appeal, 125 Pa. 211 (1889); Standard Plate Glass Co. v. Butler Water Co., 5 Pa. Super. Ct. 563 (1897).

Defenses Based on the Supreme Court's Apportionment of the Delaware River

Under this heading we discuss all the defenses raised by the City of New

York based on the Delaware River Basin Compact (1961) and on numerous Supreme Court decisions adjudicating the rights of states, among themselves, to interstate streams. Basically, these arguments rest on two propositions: (1) that federal common law governs rights in interstate streams, and rejects the common law doctrine of riparian rights; and (2) that under this federal common law, as applied in New Jersey v. New York, supra, the rights of Pennsylvania in the Delaware River have been adjudicated, thus, under the principle of parens patriae, barring recovery by these Pennsylvania plaintiffs.

These defenses are each unsound, and have been summarily disposed of in several prior decisions in this case, but since the City has briefed them extensively, I will again address them.





The federal common law doctrine of equitable apportionment was developed by the Supreme Court in answer to the problems raised by conflicting claims of states as sovereigns, to the waters of interstate rivers. These conflicts have frequently arisen, often between states with opposed notions of water law. In Kansas v. Colorado, 206 U.S. 46 (1907), for example, Kansas had adopted the common law of riparian rights and accordingly demanded that the Arkansas River flow down to it from Colorado without diminution. Colorado had adopted the Western, or dry-state doctrine of prior appropriation or apportionment.

In these interstate conflicts, the Supreme Court has held that the apportionment of waters, as between the sovereign states, presents a federal

question to be resolved according to federal common law, and has resolved such cases by developing and applying the doctrine of equitable apportionment. Under this doctrine, neither claimant state's law governs, and the waters are apportioned equitably according to a variety of factors. See, Illinois v. City of Milwaukee, 406 U.S. 91, 105 (1972); Nebraska v. Wyoming, 325 U.S. 589 (1945); Hinderlider v. La Plata & Cherry Creek Ditch Co., 304 U.S. 92 (1938); Wyoming v. Colorado, 286 U.S. 494 (1932) and 259 U.S. 419 (1922); Connecticut v. Massachusetts, 282 U.S. 660, 670 (1931); Kansas v. Colorado, supra.

In New Jersey v. New York, 347 U.S. 995 (1954) and 283 U.S. 336 (1931), the Supreme Court applied this doctrine to the apportionment of the waters of the Delaware River. New Jersey in both cases





urged, unsuccessfully, application of the strict rule of the common law under which the River would "come down to it undiminished." 283 U.S. at 342.

Pennsylvania intervened in the cases to protect its own sovereign interests, but the motion of the City of Philadelphia to intervene was denied by the Supreme Court on the principle that "the state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens'." New Jersey v. New York, 345 U.S. 369, 372 (1953), quoting Kentucky v. Indiana, 281 U.S. 163, 173-74 (1930).

In neither Delaware River case, however, did the Supreme Court directly rule on the effect of its Decrees on individual riparian owners. To the extent the subject was considered at all, the Court's

holding is favorable to these plaintiffs:

> "No diversion herein allowed shall constitute a prior appropriation of the waters of the Delaware River or confer any superiority of right upon any party hereto in respect of the use of the waters." New Jersey v. New York, 347 U.S. at 1004.

Furthermore, under the Eleventh Amendment and the principles governing parens patriae suits between states, the rights of these individual plaintiffs could not have been advanced by Pennsylvania in the Delaware River cases against New York.

Parens patriae suits must involve a sovereign or quasi-sovereign interest of the states, rather than a "mere collectivity" of the private interests of their individual citizens. Pennsylvania v. New Jersey, 426 U.S. 660, 665 (1976). See also, Hawaii v. Standard Oil, 405 U.S. 251 (1972); Commonwealth of Pennsylvania





v. Kleppe, 533 F.2d 668 (D.C. Cir. 1976). In equitable apportionment cases in which the plaintiff state has pleaded its own private interest as a riparian, the Court has specifically excluded such interests from consideration. See, e.g., Kansas v. Colorado, 206 U.S. 46, 98 (1907) ("We need not stop to consider what rights such private ownership of property might give."). In addition, any parens patriae suit brought against another state to recover for injury to the property rights of individual citizens would be barred by the Eleventh Amendment. See, New Hampshire v. Louisiana, 108 U.S. 76 (1883).

It is well settled that the individual states may, by legislation or judicial decision, establish or adopt rules of property law which create or enforce riparian rights, and rights in water generally.

"[If the States] choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections." Shively v. Bowlby, 152 U.S. 1, (1894). See also, Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 320 (1973); Fox River Paper Co. v. Railroad Comm'n., 274 U.S. 651, 655 (1926); Port of Seattle v. Oregon & Washington R. R., 255 U.S. 56 (1920); Scott v. Lattig, 227 U.S. 229, 242 (1913); Kansas v. Colorado, 206 U.S. 46, 93-94 (1907); Hardin v. Jordan, 140 U.S. 371, 380 (1891); Hoboken v. Pennsylvania R. R., 124 U.S. 656 (1887); Barney v. Keokuk, 94 U.S. 324 (1876). Most of the original states adopted the common law of England as received and applied in their jurisdiction under colonial rule. See, e.g., Art. 1 § 14 of the New York Constitution of 1938, originally found in Art. 35 of





Schedule No. 1, the Constitution of 1777 and/ § 2 of the Pennsylvania Constitution of 1874.

It is equally clear, however, that insofar as actual diversions of water are concerned, no individual state can bestow on its citizens by its local property law, a right greater than that to which the state itself is equitably entitled.

> "It may be assumed that the right adjudicated by the [Colorado] decree of January 12, 1898 to the Ditch Company is a property right indefeasible so far as concerns the State of Colorado, its citizens, and any other person claiming water rights there. But the Colorado decree could not confer on the Ditch Company rights in excess of Colorado's share of the stream; and its share was only an equitable portion thereof." Hinderlider v. La Plata & Cherry Creek Ditch Co., 304 U.S. 92, 102 (1938).

See also, Wyoming v. Colorado, 286 U.S. 494, 508 (1932); and United States v. Nevada, 412 U.S. 534, 539 (1973).

Relying on these cases, the City

argues that the common law doctrine of riparian rights is abrogated in streams the waters of which have been apportioned by Supreme Court Decree or Interstate Compact, and that, in this instance, the rights of these plaintiffs have been adjudicated with those of Pennsylvania and are thus barred.

As to the first point, it is clear from the cases cited above that riparian rights within a state are purely a matter of that state's concern, generally regulated by local property law, and are not, by that fact alone, destroyed or altered when the Supreme Court applies federal common law to conflicts between the states and apportions the total waters of the stream among the various competing interests. It should be noted that federal common law itself is not synonomous





with the abrogation of riparian rights: "[T]he quality of being riparian, especially to navigable water, may be the land's 'most valuable feature' and is part and parcel of the ownership of the land itself." Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 326 (1973); Hughes v. Washington, 389 U.S. 290, 293 (1967).

To adopt a contrary position would lead to the anomalous result that Pennsylvania landowners on the Delaware have been deprived of their rights, even as against each other. The City's second argument seeks to blunt what could otherwise be seen as a certain inequality, the fact that the City has compensated owners of New York riparian property for the loss of their property rights, and has failed to compensate Pennsylvania riparians for the same loss. The City contends that, by the Court's Decree, New York

State's present total share of the waters of the Delaware is 800 m.g.d., and that the City, in appropriating all of that share for its own uses, is thus bound to compensate New York riparians for their loss of participation in New York's share, but is not bound to compensate Pennsylvania residents, since they continue to enjoy all that they were ever entitled to enjoy -- i.e., Pennsylvania's share.

With this argument the City has proved both too much and too little. Too much, because this position cuts against the City's first argument concerning the applicability of federal common law: if the Supreme Court's Decrees abrogate the common law doctrine of riparian rights, New York riparians, as well as those in Pennsylvania, have no rights for the taking of which compensation must be made.





At the same time, the City's argument falls short of meeting the present situation. Even if we accept for the sake of argument the contention that Pennsylvania riparians on the Delaware are presently enjoying the full volume of water to which they were ever entitled, the fact remains that the City by its dams has materially altered and worsened the remaining waters of the Delaware, that is, has worsened the portions alloted, under the City's arguments, to Pennsylvania, New Jersey and Delaware. As the common law maxim runs: sic utere tuo ut alienum non laedas (property must be used in such a way as not to injury the property of others). As we shall discuss below, the City's works have adversely affected the temperature, flow, stage and quality of the

River. The Supreme Court's Decrees were certainly not intended as licenses for the City to commit such injuries without liability.

Moreover, even that portion of the City's argument relating to the quantity of water must be rejected because the City's diversion of "its" 800 m.g.d. adversely affects the quality of the water allotted to the other states bordering on the Delaware. A diminished volume of water flows in the old bed of the River and the River is at times and in parts turned into a swamp. The City undoubtedly has the right to take its share of the Delaware, but must exercise its right in such a way that the rights of others are not abridged, or alternatively, must compensate for the loss or damage.

It is noteworthy that by the City's own argument, the City has avoided paying





owners of New York property for the full loss of their riparian rights, since some water continues to flow in front of their land. In effect, the City has taken and paid compensation for only part of the value of the riparian rights of New York property owners, and has at the same time trespassed upon the rights of Pennsylvania riparians and refused to pay them anything for their identical loss.

Finally, there is no merit to the City's remaining defenses based on federal apportionment of the Delaware. The Supreme Court's retention of jurisdiction in New Jersey v. New York does not deprive this Court of jurisdiction, since jurisdiction was explicitly retained only over the parties to that case, to enable them to seek a modification of the Court's Decree. 347 U.S. at 1005.

Nor does the Delaware River Basin Compact deprive plaintiffs of their rights. Section 14.19 of that Compact expressly provides:

> "Nothing contained in this compact shall be construed as affecting or intending to affect or in any way to interfere with the law of the respective signatory parties relating to riparian rights."

Injury to Riparian Property on the Delaware

The courts have been called on repeatedly to adjudicate the question of the effect of the City's dams and diversions on the Delaware and its tributaries, and on New York property fronting on the River. In each such case, counsel for the City has argued that the effects of diversion were minimal, or even that they were beneficial. In each case the courts have found against the City on the question, and the City should be barred from re-





litigating the issue here. Consequently, although plaintiffs' evidence at trial independently proved that the City's actions were detrimental to the temperature, stage, flow and quality of the River and to adjacent property, as I so find, this Court will not here repeat at length what has been done exhaustively elsewhere.

The Report of the Special Master appointed by the Supreme Court in 1930 summarizes the voluminous evidence presented to the Master on the effects of the City's proposed diversion of 600 m.g.d. The Master found that "[t]he effect of the New York diversion on the recreational uses of the river will be to cause somewhat more than slight damage, particularly as affecting the reputation of the river as a place of recreational

resort." Id., Finding of Fact No. 37, at 205. The Master accordingly recommended that the City's diversions be limited to 440 m.g.d.

The Supreme Court specifically approved the Master's findings and restricted the City's diversions to 440 m.g.d.:

> "The Master finds that the taking of 600 million gallons daily from the tributaries will not materially affect the River or its sanitary condition, or as a source of municipal water supply, or for industrial uses, or for agriculture, or for the fisheries of shad. The effect upon the use for recreation and upon its reputation in that regard will be somewhat more serious, as will be the effect of increased salinity of the River upon the oyster fisheries. The total is found to be greater than New Jersey ought to bear, but the damage can be removed by reducing the draft of New York to 440 million gallons daily ...." 283 U.S. at 345.

The Special Master appointed by the Court in 1954 refrained from making





findings of fact, and merely recommended that the City's allotment be increased to its present 800 m.g.d. The Master noted, however, that "Pennsylvania, New Jersey and Delaware, while not showing any present damage, have adduced extensive proofs to the effect that the New York plan will cause them substantial damage in the future and strongly urge that they be given protection against that possibility if the New York plan be now authorized." Report of the Special Master at 107 (filed May 27, 1954).

In addition to these findings made by Special Masters appointed by the Supreme Court, Commissioners appointed by the New York Supreme Court pursuant to Title K of the Administrative Code of the City of New York have also considered and made findings on the condition of the Dela-

ware River from Hancock to Skinners Falls, New York, that is, on the condition of the River as it flows in front of the property of all of these plaintiffs here, except that of Van Loan/Elwood. In each case, the City argued that its regulation of the flow of the River was beneficial, or only minimally harmful, and in each case different boards of Commissioners have found de novo that the City's diversions had adversely and permanently affected the River. Each of these determinations in turn has been confirmed by a Justice of the New York Supreme Court and by the Appellate Division. See, e.g., In re Maguire (Wingert), unpublished opinion of Conway, J., dated October 16, 1973, aff'd., 48 App.Div.2d 958 (3d Dept.), motion for leave to appeal denied, 37 N.Y.2d 712 (1975); In re Maguire





(McBride), unpublished opinion of Conway, J., dated April 16, 1971, aff'd., 38 App. Div.2d 777 (3d Dept. 1972).

The issue in those cases is precisely the issue here. In In re Maguire (Wingert), for example, the Court stated:

> "There was considerable testimony in this case as to the damage to such recreational activities as fishing and swimming in the river as the result of diversion of the Delaware by New York City. In Matter of Ford (City of New York), 18 A.D.2d 855, 236 N.Y.S.2d 591, 593, also involving diversion of the Delaware by New York City, this court found that it was 'abundantly clear that a very large part of the value before the taking was in fact attributable to the recreational facilities afforded by the river and subsequently in large part destroyed' by the diversion of the waters. The expert testimony in these cases ... as to what the value of the properties would have been was properly received and considered by the commissioners as an aid to their determination of the loss to respondents, including that occasioned by the damage to the river as a recreational area.

> We find that the awards in all these cases rested upon sufficient evidence in the record ...." 48 App.Div.2d at 959.

The City objects to the application of collateral estoppel here because it claims that the issues involved in the Title K proceedings and in these cases are different, and that the standard of proof applicable in Title K proceedings is different from the standard before this Court. Both these contentions must be rejected.

The issue here, harm caused to the Delaware River by the City's actions in impounding and diverting water, is precisely the issue involved in the Title K proceedings, and decision on that question was essential to the determinations in each of those proceedings.

Secondly, under Title K the court-appointed Commissioners are a quasi-





judicial tribunal, whose powers include the right to issue subpoenas, administer oaths, take testimony, and make findings of fact. Since 1964, the scope of the Appellate Division's power to review the findings of these Commissioners has included the power to "re-evaluate the record and make its own findings" in order to modify or reject an award if necessary to conform it to the evidence presented. In re Ford (Siska), 22 N.Y.2d 834, 837 (1968). See also, In re Ford, 35 App.Div.2d 43, 46 (3d Dept. 1970). This power to review the findings of the Commissioners effectively disposes of the City's main objection to the application of the principle of collateral estoppel in this case.

The City has had more than a fair opportunity to litigate the question of damage to the Delaware River and should

not be allowed to re-litigate it here. Mutuality of estoppel is no longer a prerequisite for the application of collateral estoppel. See, Shore v. Parklane Hosiery Co., Inc., 565 F.2d 815 (2d Cir. 1977); Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir.), cert. denied 377 U.S. 934 (1964). The Shore case, supra, applied a federal rule of estoppel by judgment in a case arising under the federal securities laws. We regard the matter as procedural, not substantive, and therefore not limited by Erie principles. In any event, New York seems no longer to require mutuality. See, Schwartz v. Public Administrator, 24 N.Y.2d 65 (1969).

In addition to these judicial findings, the New York Legislature has also made its own findings in connection with enactment of Chapter 888 of the Laws of 1976. The New York Legislature found





that reservoir releases "have damaged the recreational uses, such as trout fishing and canoeing" below the City's dams. N.Y. Environmental Conservation Law § 15-0801. While these findings are not conclusive upon this Court, and may be rebutted by contrary evidence, they are entitled to some weight. See, e.g., Chastleton Corp. v. Sinclair, 264 U.S. 543, 547 (1924).

In this case, these legislative findings have not been controverted. Indeed, these findings have been established independently by the evidence introduced at trial by the plaintiffs and their expert witnesses.

Defendant's Ex. C, introduced at the trial, graphically indicates the scope of the City's manipulation of the natural flow of the Delaware. It shows that in a typical year, 1971, for example, the City

diverted for its own uses and stored some 28% (200 billion gallons) of the flow and manipulated by its releases and spills a further 18.6% (150 billion gallons) as measured at Callicoon, New York. The amount annually diverted by the City is approximately 88% of the full amount allowed by the Supreme Court's Decree.

The River Master's Annual Reports show the details of this manipulation. In 1969 for example, the City released only the minimum conservation releases for 14 consecutive days in June, and then in July released approximately a billion gallons a day for 11 consecutive days. From the end of July until mid-August, only conservation releases were made. At the end of August, there again followed another extended period of releases averaging one billion gallons per day. This same general





pattern has been followed in succeeding years.

On the trial of this action, the City introduced the testimony of Mr. Stanton, an engineer and acting director of the City's Bureau of Claims, to show that extreme low flows after the diversion were, on a monthly average, considerably higher than prediversion low flows. I find this to be true, but such evidence does not rebut or negate the effect of the plaintiffs' evidence of enormous fluctuations on a daily basis.

Mr. Paul E. Blomquist, an expert called by the City, testified as follows on the fluctuation in flow as it affected one of the properties in this case, that of Van Loan/Elwood:

> A. "With regard to Van Loan, which is on the West Branch of the Delaware River, subject principally to the larger releases

when they are necessary, from Cannonsville Reservoir, there would be a pronounced increase in the flow past that property under conditions of high release in the summer months ....

Q. Mr. Blomquist, if you will pardon an interruption, you said 'an increased flow.' Increased from what?

A. Above what would have passed by absent the reservoir. As a matter of fact, substantially increased flows because of the operating policy of the City of New York at this time.

Now, during the years when the run-off is high and the reservoir is being recharged, then the river below the dam would be getting less than the normal or the natural flow; and as a consequence of that, there would be less flow in the river past Van Loan than there would have been absent the reservoir.

Now, this is a condition which is brought about by all of this. In weather conditions, with the dry weather, a drought period, there are extended or high releases from Cannonsville, which augment the flow at Van Loan or at any





point between Van Loan and the dam; and then, when the flow at Montague, where no releases are necessary, then there is an effect of withholding, a short reduction of flow."
(Transcript, pp. 59-60.)

The plaintiffs' proof at trial showed the adverse effect these fluctuations in volume, stage and flow had on canoeing and other water recreations. One witness testified that he had seen an automobile driven across the Delaware above the Canfield property during a period of low flow.

An obvious effect of these great fluctuations in volume has been an enormous range in summer water temperatures in the River. In every body of deep, still water, such as the Cannonsville and Pepacton Reservoirs, thermal stratification occurs, with the thermocline usually at about 25 feet. Below that depth, in the

hypolimnion, water temperatures average 40° F. Because both of these Reservoirs release water into the River from spillways in the bottom of the dams, water is released in normal periods at about 40 degrees.

The effect of these cold releases is more apparent, of course, the nearer one approaches the source of the releases, and so is most apparent at the Van Loan/ Elwood property which is approximately five miles above the confluence of the East and West Branches. However, these effects are still felt at the Canfield property which is some 40 miles below these dams.

A correlation of summer water temperatures, as measured at Callicoon, New York (situated between the Canfield and Gregory properties) and water releases by the City shows that when the releases were





minimal, water temperatures closely approximated air temperatures and averaged in the 70's Farenheit. When the City's releases approached or exceeded one billion gallons a day, the water temperature dropped into the low 60's or upper 50's. These figures, derived from exhibits prepared by the City, are confirmed by plaintiffs' Ex. 24, an official report prepared by the United States Geological Survey in 1964. The report is properly admissible here under Rule 803(8), F.R.Evid.

Each of the plaintiffs testifying at the trial mentioned the immediate and adverse effect such fluctuations in temperature had on swimming, but the more serious consequences were those affecting fisheries in the Delaware.

Before the diversion of the head-

waters of the Delaware, the River was considered a warm-water stream, with summer temperatures averaging in the 70's or low 80's. At that time, the major fishery in the main body of the River was for small mouth bass and walleyed pike, but there was some fishing for trout near the spring holes and hear [sic] the mouths of tributaries.

Mr. Edward C. Raney, an icthyologist, testified for plaintiffs on the deleterious effects of the City's diversion of water from the Delaware. Briefly, he testified, and I find, that the City's dams act to prevent normal spring freshets which formerly cleansed the River of slime and algae and of accumulated rubble at the mouths of tributaries. The consequence of the general stagnation of the River and the growth of slime along it has been a general increase in mosquitos and





insects on riparian property. The consequence of the formation of deltas at the mouths of tributaries to the Delaware has been a marked change in the normal habits of fish in the River and their exclusion in some degree from the tributaries.

Low winter flows in the River have allowed ice to form to the bottom of the stream in many places, destroying the aquatic organisms on which fish feed.

The fluctuations in temperature caused by the City's diversions have almost totally destroyed the warm-water fisheries in the River. The optimum temperature for warm-water fish is between 70° and 80° F. and, as mentioned above, the City's releases have frequently acted to reduce the summer water temperatures for prolonged periods to the low 60's or upper 50's. In addition, high releases

of water during the spawning season have driven bass from their nests and prevented the propagation of young.

The same fluctuation in temperature and flow has in large measure blocked efforts to turn the River into a cold-water fishery for trout: low flows from the City's dams allow the temperature of the River to approach air temperature, which, in the summer months, is usually in the range from 70° to 80° F. Unless trout can hide in a cold spring or inlet until the next City release, they will be subjected to trauma or death.

Mr. Raney's observation of fishing on the Delaware were all made before 1965, but the conditions upon which he based his opinions still exist and are largely unchanged. In addition, his opinions were borne out by those of Harry





Darby and Harry Phillips, both active anglers with more recent experience of the River.

On the trial of this action, plaintiffs sought to have admitted into evidence a report, issued by the New York State Department of Environmental Conservation, entitled "Proposed Alternative Releases from New York City Reservoirs in the Upper Delaware River Basin" (1974). The factual material contained in the report is clearly admissible, see Rule 803(8)(C), F.R.Evid., N.Y. Environ. Conserv. Law § 3-0301, and Williamson v. Union Oil Co. of California, 125 F.Supp. 570 (D. Colo. 1954). This report generally reinforces plaintiffs' contentions concerning the precarious position of cold-water fisheries in the Delaware.

A more serious problem with the

report, however, is one that has only arisen since 1976 when the City began to make increased daily releases under the new Environmental Conservation Law. The opinions contained in the report are to the effect that increased flows would in large measure serve to stabilize the trout fisheries in the Delaware. While these opinions as such may not be admissible, this Court may take judicial notice of the elementary laws of physics and draw its own conclusions from them and from evidence already properly admitted. Accordingly, I find that even if the new statutory minimum flow were to be maintained by the City (a condition which will be no means necessarily occur), it would not be sufficient to repair the damage done to the River by the City's diversions, even as concerns the trout





fisheries: spring freshets would still be lacking in the River, deltas would still form at the mouths of tributaries, blocking trout seeking refuge in the cooler waters, and the massive fluctuations in temperature, flow and velocity, produced by the City's meeting the Montague formula would still occur.

The plaintiffs have not only proved that the River has been harmed, and with it their properties, but they have also established that the harm is permanent, in the sense that it is likely to continue while the City's dams and reservoirs endure. As discussed above, the new regulations enacted under the Environmental Conservation Law in no way detract from this conclusion.

The evidence introduced by the City on the condition of the Delaware

River fisheries does not rebut the testimony of plaintiffs and their witnesses. One of the City's biologists only grudgingly admitted that the City's diversions and dams has caused any damage to the fishing, a position that is scarcely tenable. A second expert, Mr. Grim, admitted that the River had been adversely affected, but differed with plaintiffs only on the question of degree.

Necessary and Proper Parties

The City has argued that this action must be dismissed since certain parties, notably the Commonwealth of Pennsylvania and the State of New York, are absent and are necessary to the resolution of the controversy. This argument is without merit. See, Brooks v. United States, 119 F.2d 636, 643 (9th Cir. 1941). This Court is neither apportioning the





waters of the Delaware nor questioning the validity of prior apportionments. All that is in issue here is a trespass to a private property right protected both by the property law of New York and Pennsylvania, as well as the Fourteenth Amendment. And the sole trespasser is the City of New York.

The City has also argued that the Lake and Van Loan/Elwood claims must be dismissed because those plaintiffs had sold their properties long before filing a Notice of Claim, and consequently had been out of possession at all times during which an actionable trespass occurred.

Generally, in Pennsylvania and New York, for a plaintiff to recover damages for trespass to property, he must have possession of the land, or the right to immediate possession of it, at the time of the injury. Nevertheless, the right

to recover damages for a trespass or a taking is a personal one, assignable or retainable by a vendor. See, e.g., In re Appointing Viewers to Assess Damages, 409 Pa. 290, 186 A.2d 20 (1962); McFadden v. Johnson, 72 Pa. 335 (1872). And this is so whether the cause of action has already accrued when assigned, or is yet to arise. In the analogous situation where a grantor reserves, in a deed, damages with respect to the existing and future condemnation of land, the Pennsylvania courts have upheld the grantor's rights. See, e.g., Chapleski v. Commonwealth of Pennsylvania, Dept. of Highways, 5 Pa. Commonwealth 482, 291 A.2d 360 (1972).

Both New York and Pennsylvania favor free alienability of interests in land. Having accepted a deed with such rights reserved and excluded, subsequent





transferees of the damaged parcels would be hard put to make any claim against the City, and accordingly there is no way in which the City would be likely to pay twice. If the City's arguments with respect to lack of standing were to be accepted here, no one would be able to sue to recover for a clearly proved trespass: these plaintiffs would be barred because they are out of possession, while the vendees in possession would be barred by the exclusions and reservations in their deeds.

I find and conclude that both these plaintiffs reserved in their deeds of conveyance all rights against the City of New York and are entitled to bring their actions on the theory that they are suing to enforce retained rights, or alternatively, on the theory that acceptance of the respective contracts of sale and deeds

constituted an equitable assignment by the vendees to these plaintiffs of their possessory right of action.

Finally, George Elwood, as Administrator d.b.n., c.t.a., is the proper party to bring this action for the benefit of the Van Loan Estate. His powers as Administrator included the power to sell the property. This he did, expressly retaining in the deed "rights acquired and to be acquired" against the City.

Mr. Elwood's account to the Orphan's Court of Wayne County, Pennsylvania, set forth in detail his activities in pursuing the rights of the Estate against the City of New York, and the account was approved by the President Judge of that Court on September 11, 1967.

Essentially, Mr. Elwood's actions in this litigation are authorized as a necessary adjunct of his testamentary





power to sell the real property of the Estate on reasonable terms, and to retain and enforce rights already accrued or to arise in favor of the decedent's ownership, against the City.

Damages

On the trial of this action both parties presented evidence on the value of plaintiffs' properties and also presented appraisals made by their respective experts. In addition, on June 27, 1975, in the company of counsel, I made a personal inspection of all of the damaged properties and several other properties used as comparables in the appraisals.

In Elwood v. City of New York, an unpublished opinion dated March 27, 1973, Judge Pierce of this Court held with regard to one of the plaintiffs here that the "initial period of the claim would be

limited ... to encompass trespass only up to 90 days before the notice of claim was filed." Id. at 4. This is the proper standard to be used in computing damages in all these cases. See also, Hackensack Water Co. v. Village of Nyack, 289 F.Supp. 671 (S.D.N.Y. 1968).

The City argues from this ruling that four of the five plaintiffs here are barred from recovery because in each of their cases the date of the sworn appraisal submitted was more than 90 days before the filing of a Notice of Claim with the City. All these appraisals were made by Mr. Rodman Fellows, who uniformly used October 20, 1971 as the date for appraisal. Mr. Fellows' appraisals were properly admitted and form the basis for his direct testimony on the value of the plaintiffs' properties given at trial. Moreover, to





the extent plaintiffs' appraisals are credible for the period they claim to reflect, they are, in the light of the generally upward trend in real estate prices proved on the trial, a minimum estimate of damages, valid for later periods for which damages are properly recoverable. Accordingly, this date variance is not a basis for dismissal. Damages will be determined by the Court based on the entire record, and as of the date ninety days prior to filing a Notice of Claim, hereinafter the "damage date." Plaintiffs have proved a continuing and permanent trespass by the City with respect to their riparian rights. In a continuing trespass, "each new day establishes the cause anew." Bloss v. Village of Canastota, 35 Misc.2d 829, 831, 232 N.Y.S.2d 166, 168 (Sup. Ct. Mad. Co.

1962). See, Gregory v. City of New York, 346 F.Supp. 140, 144 (S.D.N.Y. 1972).

Consequently, these plaintiffs, as we held in Gregory, cannot be barred forever by the "late" filing of their Notices of Claim; nor are they prevented by the date of filing of their Notices of Claim, from presenting estimates of value valid for any date within the period extending from 90 days prior to filing their Notices to the time of trial. We answer now, in the negative, the question posed in Gregory, supra, at 145:

> "If, as appears likely, lump-sum damages are assessed to cover the diversion from inception into perpetuity, or near perpetuity measured by the future life of the dams, will such damages be lessened materially because the first five or six years of such permanent diversions are excluded?"

Plaintiffs' motions to strike the appraisals of Mr. Walter Donnaruma, on the





ground that they lack detailed adjustments for time and location, are denied. The appraisals are admissible within the philosophy of Rule 401, F.R.Evid., regarded as declaratory of existing law in this Court. In any event, adequate notice and opportunity to demand such adjustments prior to trial existed, and were not availed of.

There is another difficulty with the Donnaruma appraisals which goes only to their weight and significance. They are based on the clearly false premise that no adverse consequences whatsoever were caused to riparian property on the Delaware by the construction and operation of the Cannonsville and Pepacton Reservoirs. Consistent with that view, all of Mr. Donnaruma's comparable "before" values comprised riparian properties on the Delaware, which themselves had been

affected by the City's diversion. This approach was rejected in In re Maguire (Wingert), 48 App.Div.2d 958 (3d Dept. 1975), in which the City relied on similar appraisals by Mr. Donnaruma, and it is rejected here.

The proper method of appraisal and the manner in which damages must be computed is based on the difference between the market value of the damaged parcel, as subjected to the permanent trespass on the damage date, and the market value of the parcel as it would have been on that date, but for the trespass.

As stated in In re Maguire (Wingert), supra, at 958-59:

> "The primary contention of appellants is that respondents' expert, in all the cases excepting Phillips', by basing his estimation of damages on the value that the subject properties would have had but for the loss of riparian rights, rather than upon the actual





> decrease in value, submitted proof which was speculative and inadequate. The permissibility of introducing expert testimony with respect to both the present value of the premises with the water diverted and also as to what the present value would be had there been no diversion was upheld by this court in Gallagher v. Kingston Water Co. (25 App Div 82, aff'd 164 NY 602). .... 'The expert *** necessarily has to consider both benefits and injuries and balance the account--which is the very thing the jury have to do. The majority of the court thought it better that all the conditions affecting values be shown, and thereupon the court or jury should determine. In the case before us there are no benefits to be considered; it is a simple question of value, with or without the water *** Experts know better than the non-expert' (Gallagher v. Kingston Water Co., supra. pp 85, 86). We find no case modifying the basic holding in Gallagher and the reasoning therein is applicable to the instant situation. The takings herein have not brought benefits to respondents' properties and we are presented with a simple question of value upon which expert testimony would be most useful. There was considerable testimony in this case as to the damage to such recreational activities as

> fishing and swimming in the river as the result of diversion of the Delaware by New York City. In Matter of Ford (City of New York) (18 AD2d 855, 856), also involving diversion of the Delaware by New York City, this court found that it was 'abundantly clear that a very large part of the value before the taking was in fact attributable to the recreational facilities afforded by the river and subsequently in large part destroyed' by the diversion of the waters. The expert testimony in these cases (excepting Phillips') as to what the value of the properties would have been was properly received and considered by the commissioners as an aid to their determination of the loss to respondents, including that occasioned by the damage to the river as a recreational area. We find that the awards in all of these cases rested upon sufficient evidence in the record and fell within the range of expert testimony with regard to damages and values."

Cf., Rider v. York Haven Water Co., 251 Pa. 18 (1915); Miller v. Windsor Water Co., 148 Pa. 429 (1892).

Mr. Fellows' appraisals follow this approach and include very detailed adjustments made for time of sale and size of





parcel. None of the comparable sales is remote in time from the valuation date. Each of Mr. Fellows' "before" sales was a sale of recreational land fronting on water not affected by the diversion of the Delaware; his "after" sales were sales of Delaware River properties, most notably the 1966 sale of the Van Loan property on the West Branch.

The City has moved after trial to strike plaintiffs' appraisals on the ground that Mr. Fellows relied on plaintiffs' Ex. 25 in making them. This motion is denied. Exhibit 25 was properly admitted on the trial for its factual content, which would have been properly relied on by Mr. Fellows in making his appraisals. There is no evidence that Mr. Fellows actually relied on opinions in Ex. 25 in preparing his reports. To

the extent that his appraisals do reflect the opinions expressed in that report, they are, in the light of subsequent events, favorable to the City. Reliance on the opinions of others is not uncommon on the part of an expert witness, and is now expressly authorized by Rule 703, F.R.Evid.

Defendant's remaining objections to the Fellows' appraisals are equally without merit. It is of no significance that Fellows chose to call the date chosen for evaluation the "date of condemnation." The reality sought to be expressed, not the expression chosen, is the essential factor here, and Mr. Fellows, as discussed above, used the correct formula in estimating damages.

Finally, Mr. Fellows' concession that the prices of all these parcels had been rising at about 5% per year since the early 1970's is not inconsistent with his





assertion that damage has occurred. Both parties agree, and this Court finds, that the highest and best use of these properties is for recreation. Damages are to be based on the highest and best use of the property before the trespass. See, Snyder v. Pennsylvania, 412 Pa. 15, 192 A.2d 650 (1963).

Van Loan/Elwood. Mr. Fellows estimated the "before" or hypothetical value of the Van Loan/Elwood property absent the trespass as of October 20, 1971, at $160,500.00, and its value "after", that is, as it stood on October 20, 1971, at $22,000.00. The difference between these amounts is his expert opinion concerning damages.

The Delaware River Valley is accessible and is near large population centers. The beauty of the climate and the outstand-

ing attractiveness for recreational purposes of the Delaware River Valley riparian properties cannot be denied.

As noted, the Court inspected this and the properties discussed below. The Van Loan/Elwood property consists of approximately 123.5 acres of land with 2,720 feet of River frontage. Ball's Creek flows through the property towards the River, and part of the property faces Pine Island in the River, premises owned by others. The channel between the Van Loan/Elwood property and Pine Island is not the main flow of the River. Within the tract, but excluded from the ownership, is the small rural cemetery belonging to the now defunct community of Ball's Eddy, and an adjacent structure not owned by Van Loan/Elwood. See map included in Fellows' Appraisal.





The Court accepts for purposes of the damage formula, the value of $22,000.00 after damages, computed as of October 20, 1971, and adjusts that figure, for time, by adding 5.8%. The proper date for valuation of this parcel is January 25, 1973. The upward trend of acreage prices in the Delaware Valley and on comparable unregulated streams for recreational land has increased at about 5% per year.

The Court regards Mr. Fellows' appraised "before" market value of $160,500.00 as somewhat excessive. Comparable sales Nos. 4 and 5 in the Van Loan/Elwood appraisal are of very slight usefulness, because the Van Loan/Elwood parcel must be regarded as an acreage situation of which the highest and best use contemplates subdivision, and a discount for size. The difficulty with the analysis of the

other comparables is that they each include substantial adjustments for "enhancement" due to perceived differences in topography and utility. Some of these points of enhancement lie to an extent in the eye of the beholder, and cannot be substantiated by market data. Placing reasonable limitations on such largely subjective enhancements, the comparable acreage sales would appear to indicate a market value adjusted for time, of about $800.00 per acre for the Van Loan/Elwood acreage. This is consistent with reality, as confirmed by my inspection of the premises, and I find that as of January 25, 1973, the Van Loan/Elwood property would have had a value without the existence of the continuing trespass as follows:





| | |
|---|---|
| Buildings ..... | $ 6,877.00 |
| Building site (see p. 28 of Fellows' appraisal)..... | 2,116.00 |
| Acreage (121.6) ..... | 97,280.00 |
| Total | $106,273.00 |
| Less "After" Value | 23,276.00 |
| TOTAL DAMAGES | $ 82,997.00 |

Plaintiff George Elwood, as Administrator, etc., shall recover $82,997.00, together with pre-judgment interest from January 25, 1973 to the date of the judgment, and his costs to be taxed, including the additional allowances for expenses and disbursements authorized by § K51-44.0 of the Administrative Code of the City of New York.

As was observed by Judge Tenney (supra, p. 13), the standard for fixing damages for these plaintiffs is the same as the measure of damages being employed in proceedings by the City with respect to Damage Parcels on the other [New York]

side of the River, opposite plaintiffs' properties. There, in proceedings under Title K of the Administrative Code of the City of New York, the City has condemned the riparian rights to the extent infringed upon by its dams. In reality, the proceedings here are, as Judge Tenney recognized, tantamount to condemnation. Accordingly the interest of justice in these cases demands that these plaintiffs, although proceeding technically on the theory of a permanent and continuous trespass or tort, should be treated as nearly as possible in all respects equally with persons similarly situated owning riparian land on the New York side of the River. These latter persons receive interest on their awards from the date of "taking," at the rate of 6% per annum, notwithstanding the general limitation on interest





imposed by the State of New York with respect to claims against municipal corporations (3%) found in § 3-a of the New York General Municipal Law. Pre-judgment interest allowed under current economic conditions at an annual rate of less than 6% is a deprivation of property and an obvious injustice. Accordingly, Elwood's judgment, and the other judgments to be entered herein will bear pre-judgment interest at the rate of 6% per annum from the damage date until paid. See generally, Hartman v. City of New York, 29 Misc.2d 578 (Sup.Ct. Sullivan Co. 1961).

In this case and with respect to the four other parcels, the Court will stay enforcement of judgment pending appellate finality, and pending also compliance with § 394a-2.0 of the Administrative Code of the City of New York. In

addition, as a condition of payment, the City may require from Elwood and the other plaintiffs, releases or equivalent instruments in proper form which may be recorded in the land records of Wayne County, Pennsylvania so as to protect against any future claims, and give notice in the chain of title to persons hereafter acquiring any interest in the property.

Badgley. The Badgley property presents vivid evidence of the limitations on recreational use of the River occurring as a result of the damage described before. Here we have a parcel primarily used for recreation, having river frontage on the Delaware River, on which the owners have found it necessary to install a swimming pool. In addition to the swimming pool, this property, which consists of approximately two acres with 530 feet of River





frontage, is improved with a large residence near the highway, also used as a retail antique shop. The date for fixing damages for the Badgley property is February 24, 1972. Since the Fellows' appraisal is computed as of October 20, 1971, an upward adjustment for time amounting to 1.7% increment is required.

The Court finds that the value "after" the trespass is $42,500.00. The analysis by Mr. Fellows of the "before" value reached a total as of October, 1971 of $71,000.00. The comparable sales have been analyzed in accordance with generally accepted principles affecting the appraisal of real property, but here again, as in Van Loan/Elwood, there seems to be a subjective element which may be regarded as too optimistic. The Court, based on all of the evidence in this case, and relying also on its own inspection of the

premises, believes that the value without regard to the taking should be, and is, fixed in the amount of $65,000.00. This leads to a damage award in favor of Lillian Badgley (now Dixon) of $22,500.00 with pre-judgment interest from February 24, 1972 to the date of the judgment at the rate of 6% per annum, and costs and disbursements to be taxed.

Lake. The Lake property consists of approximately 15 acres with 600 feet of River frontage, intersected by Spring Run Creek on the northern section of the property. The property also has a small piece of frontage at its southerly inland corner on Equinunk Creek. These creeks are tributaries of the Delaware River. A building site improved by a residence occupies approximately three acres of the land. There is also an abandoned schoolhouse on





the property, an abandoned church building used for storage, and several small sheds. The damage date for the Lake parcel is February 23, 1972. Here again, the appraisal is based on October 20, 1971, and an upward adjustment of 1.7% appears appropriate.

The appraisal submitted by the City as of February 22, 1972 is $23,500.00. A consideration of the analysis by Mr. Donnaruma of the Lake property, and the Court's inspection thereof, indicates that the valuation of $18,800.00 as of October 20, 1971 is unduly low for this parcel, and the Court will adopt the "after" figure of $23,500.00.

The value before is fixed at $34,675.00, resulting in a damage award of $11,175.00, together with interest at 6% per annum from February 23, 1972, with

costs and disbursements to be taxed.

Gregory. Gregory's property consists of 89 acres of land with 795 feet of Delaware River frontage. There is a residence separated from the River by a town highway. That part of the premises west of the town road has a commanding view of the valley and fields which front on the River.

Beginning in about 1964, Gregory successfully sold Riverfront lots to approximately ten purchasers. Most of these lots are relatively small, and are itemized and described in Mr. Fellows' appraisal. The damage date for Gregory is February 25, 1972. Again, an upward adjustment of 1.7% is necessary with respect to the Fellows appraisal. The Court finds that the property value after the damage date is $68,000.00. There is little sub-





stantial difference between the appraisers on this point.

For his appraisal before the damage date, Mr. Fellows valued 88 acres of recreational land at $900.00 per acre average price. This value is somewhat high, because of the fact that some of the land is rather remote from the River and separated by a town highway. It would seem that the best of the Gregory Riverfront property has already been sold off in small parcels. A value of $850.00 per acre as of February 25, 1972 would seem more in keeping with reality. This leads to the following revision of the "before" values as set forth on p. 28 of Mr. Fellows' appraisal and adjusted for time by the Court:

| | |
|---|---|
| 88 Acres of recreational land | $ 74,800.00 |
| Building site and land improvements | 4,095.00 |
| Residence | 18,300.00 |
| Barn | 1,000.00 |
| Garage | 500.00 |
| Total | $ 98,695.00 |
| Less "After" Value | 68,000.00 |
| TOTAL DAMAGES | $30,695.00 |

The damage award for the Gregory parcel is fixed at $30,695.00, together with interest at 6% per annum from February 25, 1972, with costs and disbursements to be taxed.

Canfield. The Canfield property is probably the most valuable of the parcels in this case. It consists of approximately 166 acres, having approximately 6,700 feet of frontage on a bend in the Delaware





River on the Pennsylvania side between Callicoon, New York and Skinner's Falls, New York. There is a large island in the middle of the River, not part of the subject property. As the most downstream parcel, it enjoys a greater depth and flow of water than those parcels further upstream. The downstream end of the property is bounded by Schoolhouse Creek, a tributary of the Delaware. Typography of the land and configuration of the River at Canfield's property combine to give this parcel the greatest "river influence," i.e., ratio of frontage to subdividable acreage, of any of the parcels.

The open land was at the time of trial being used by a tenant for agricultural purposes, principally corn and some vegetable gardening. There is an obsolete barn which is not being used.

With respect to this parcel, the correct damage date is July 23, 1971. The City appraiser, Mr. Walter Donnaruma appraised the property at $160,000.00 on July 20, 1971 without regard to any riparian damage, which he found to be minimal.

The best evidence of value before damage in this case is found in Mr. Fellows' appraisal. Mr. Fellows' figures for this property are regarded as on the conservative side. He found an acreage value of $900.00 per unit average, or a total value before diversion of $149,400.00, and an after value of approximately $300.00 per acre, giving rise to damages of $99,600.00. The Court inspected this parcel also. The damages found by Fellows of $99,600.00 are supported by credible testimony. The Court believes that on this parcel, Fellows is low, both as to his





"before" value, and his value "after" the damage, but that the total net damage found is within the realm of reason, and indeed, conservative. In any event, these figures represent the opinion of a qualified and credible expert, there is no credible contrary evidence in the case, and the net amount is borne out by the Court's inspection.

The damage award for the Canfield property is fixed at $99,600.00, together with interest at 6% per annum from July 23, 1971, with costs and disbursements to be taxed.

Conclusion

The foregoing, together with the conclusions of law expressed in all prior decisions made in any of these consolidated actions to the extent not inconsistent herewith, taken together, constitute

the Court's findings of fact and conclusions of law, pursuant to Rule 52, F.R.Civ. P.

The Court is filing five separate judgments simultaneously herewith, each of which is stayed as hereinbefore set forth. Counsel for plaintiffs are directed to tax their costs before the Clerk within thirty (30) days, on not less than five (5) days notice, or upon waiver of notice.

Dated: New York, New York
March 31, 1978

Charles L. Brieant
U. S. D. J.





F O O T N O T E S

1. In his decision, Judge McLean specifically rejected the City's defense that the Van Loan action was barred by the Supreme Court's decision in New Jersey v. New York, 347 U.S. 995 (1954), discussed in the text, pp. 14-21:

> "[T]hat action, it is true, involved the right of New York to divert waters of the Delaware River by the construction of dams and reservoirs, including the Cannonsville Reservoir, but the action did not involve the rights of individual property owners, and the Supreme Court's decree did not touch that question or purport to exclude it from consideration by the District Court in a proper case." Id. at 4.

2. Another case involving Pennsylvania riparian land on the Delaware River situated similarly to the lands of the plaintiffs here and in which similar claims were pleaded has been tried.

In a Decision dated August 1, 1972, Judge Bonsal held that the plaintiff in Dempsey v. City of New York, 66 Civ. 2153, had failed to prove his case. Dempsey was proceeding pro se on the theory that he had failed to re-open his resort hotel on the Delaware River because of the City's diversion of the River. The Court held at p. 5 of its Decision that:

> "[a] careful review of the evidence satisfies the court that the plaintiff's uncorroborated testimony has failed to prove by a fair preponderance of the evidence that he was unable to use his property as a hotel and restaurant because of the diversion of water by the City. This disposition makes it unnecessary to consider the several defenses interposed by the City."

3. Title K, Chapter 51 of the Administrative Code of the City of New York, known as the Water Supply Act, created





a Board, consisting of four Commissioners, to supervise and ensure the City's continued supply of fresh water. The Act provides for compensation to be paid land owners in New York whose property is taken outright for reservoir and associated purposes (K51-11.0). It also provides for compensation for owners whose property is "directly or indirectly decreased in value" (K51-44.0), as a result of the City's efforts to obtain water. Under this latter provision, substantial awards have been paid to riparians on the Neversink and Delaware Rivers, among others. See, e.g., In re Maguire (Wingert), 48 App.Div.2d 958 (3d Dept. 1975), leave to appeal denied, 37 N.Y.2d 712 (1976); In re Ford, 35 App.Div.2d 626 (3d Dept. 1970); In re

Ford (Luth), 18 App.Div.2d 855 (3d Dept. 1963). In Gregory v. City of New York, 346 F.Supp. 140 (S.D.N.Y. 1972), this Court held that procedures under Title K were not available to riparians situated outside of New York State.

4. The deed of conveyance, Ex. 48, recites that "the petitioner (Wayne County Savings Bank) believed the sum a full and fair price for the said premises and more than could be realized at a public sale; that the petitioner believed it to be to the interests and advantage of the said minor that the said premises be sold for the price above mentioned."

5. Presumably, such failure was justified by immediate and overwhelming





public necessity. No penal sanctions were imposed.

6. Riparian owners maintaining the electric generating dams on the Mongaup River and at Lake Wallenpaupack on the Lackawaxen River are not engaging in unreasonable diversion in violation of the riparian rights of downstream owners. They are merely regulating the flow in the stream in an unnatural fashion, dependent on their power demands; the more electricity they generate at their locations during a given time period, the greater will be the amount of impounded waters released. It is ordinarily considered that the actions of the owner of a dam who makes reasonable use of the waters of a stream in the operation of saw

mills, grist mills, etc., without diverting water out of the watershed, are not actionable at the instance of the downstream owner. See, e.g., Pierson v. Speyer, 178 N.Y. 270 (1904).

7. This is confirmed by a Memorandum filed in the Supreme Court by then Solicitor General Bork in 1976, pursuant to a request by the Clerk of that Court for information on the possible effects on the 1954 Decree of N.Y. Environ. Cons. L. § 15-0803, et seq. (July 28, 1976), concerning Regulation of Reservoir Releases. "For greater convenience in its operation, and because of the higher quality water in the Neversink and Pepacton Reservoirs, the city has taken the major portion of its water for city supply from those reservoirs and made the major





portions of the downstream releases required under the decree from the Cannonville [sic] Reservoir." Memorandum at 2.

# APPENDIX B

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - -X

LLOYD F. CANFIELD and ELOISE L. CANFIELD, : 71 Civ. 5568-CLB

Plaintiffs, :

-against- : JUDGMENT

THE CITY OF NEW YORK, : #78,695

Defendant. :

- - - - - - - - - - - - - - - - - -X

Upon the Findings and Conclusions after trial filed simultaneously herewith, and on all prior papers and proceedings, it is

ADJUDGED, that plaintiffs, LLOYD F. CANFIELD and ELOISE L. CANFIELD, recover of the defendant CITY OF NEW YORK, a municipal corporation of the State of New York, the sum of $99,600.00, together with pre-judgment interest thereon amounting to $39,972.000, making a total of $139,572.00, and costs to be taxed, and interest thereon at the rate of 6% per annum from the date of this Judgment untill the date of payment; and it is further

ORDERED, that proceedings to enforce this Judgment are stayed pending appellate finality, and pending compliance by plaintiffs with § 394a-2.0 of the Administrative Code of the City of New York and tender by plaintiffs to defendant of

a release in proper form for record in Wayne County, Pennsylvania.

Dated: New York, New York
March 31, 1978

s/
Charles L. Brieant
U. S. D. J.

JUDGMENT ENTERED - 4/3/78

Raymond F. Burghardt
CLERK

4/24/78 - Bill of Costs as taxed in the sum of $895.10, in favor of plaintiffs, as against defendants, and added to the judgment.

s/ Raymond F. Burghardt
CLERK

# APPENDIX C

# UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 385-389—August Term, 1978.

(Argued February 5, 1979

Decided September 27, 1979.)

Docket Nos. 78-7196 - 78-7200

LILLIAN J. BADGLEY

EMIL LAKE and HELEN LAKE,

GEORGE ELWOOD, Admr., ESTATE OF B. VAN LOAN,

LLOYD and ELOISE L. CANFIELD,

GEORGE and HELEN GREGORY,

*Plaintiffs-Appellees.*

—v.—

THE CITY OF NEW YORK,

*Defendant-Appellant.*

Before:

WATERMAN, MANSFIELD and TIMBERS,

*Circuit Judges.*

City of New York appeals from judgments entered below, Southern District of New York, Brieant, J.,

opinion reported at 450 F.Supp. 846 (1978), holding appellant liable to these appellees in these cases, consolidated upon appeal. Appellees are Pennsylvania owners of Pennsylvanian riparian lands along the Delaware River, and they obtained judgments against the City for its alleged tortious manipulation of the waters of the River. Judgments reversed.

---

MICHAEL R. GOTTLIEB (Kalter & Gottlieb, Woodbourne, N.Y. on the brief) *for Appellees Elwood, Gregory, Badgley and Lake.*

JACK WEINBERG (Graubard, Moskowitz, McGoldrick, Lannett and Horowitz, New York City, and Herman E. Gottfried, Margaretville, N.Y., Jay C. Cooke and Steven J. Brill, of counsel, on the brief) *for Appellees Canfield.*

MORRIS EINHORN (Allen G. Schwartz, Corporation Counsel, New York City, L. Kevin Sheridan, Leonard Olarsch and William Murray, of counsel, on the brief) *for Appellant.*

---

WATERMAN, *Circuit Judge:*

These actions consolidated for trial, were brought by or in the name of, owners of riparian land situated in Pennsylvania, who claim that the value of their lands along the Delaware River and its West Branch was diminished by the City of New York's impoundment, diversion and manipulation of the headwaters of the Delaware River for the City's





public water supply purposes. The City's answer admitted that it impounds and diverts the Delaware waters and that it manipulates the flow of the river. The City contended, however, that these acts were authorized by the U.S. Supreme Court's equitable apportionment of the Delaware River waters, decreed in *New Jersey v. New York,* 347 U.S. 995 (1954) [*New Jersey v. New York IV*][1], litigation to which the Commonwealth of Pennsylvania was a party. Accordingly, the City asserted that the rights of these individual riparian landowners in Pennsylvania were adjudicated with those of Pennsylvania itself and are thus barred.

In June 1975, a non-jury trial on the issues of liability and damages was held in the United States District Court for the Southern District of New York (Brieant, District Judge). On September 4, 1976, the trial record was reopened to allow submissions by the parties with reference to legislation enacted in July 1976 (1976 N.Y. Laws ch. 888, codified at N.Y. Envir. Conserv. Law §§ 15-0801 to -0807 (McKinney Supp. 1979). On March 31, 1978, the trial court issued its decision, 450 F.Supp. 846 (SDNY 1978), setting forth its findings of fact and conclusions of

---

1 In the course of this opinion, reference will be made to various stages of the litigation concerning the equitable apportionment of the waters of the Delaware River by the United States Supreme Court. Because the same parties were involved at each stage, a Roman numeral suffix has been appended to the official citation to differentiate the separate stages. It should be noted that the separate stages, as set forth in the list below, follow a chronological order, rather than the order of their appearance in this opinion.
*New Jersey v. New York I,* 280 U.S. 528 (1930)
*New Jersey v. New York II,* 283 U.S. 805 (1931)
*New Jersey v. New York III,* 345 U.S. 369 (1953)
*New Jersey v. New York IV,* 347 U.S. 995 (1954).

law, awarding damages plus interest to the plaintiffs appellees and against the City. From that judgment the City appeals, raising three allegations of error: (1) that the district court erred in holding that common law riparian rights are not destroyed or altered in streams, the waters of which have been apportioned by a United States Supreme Court decree invoking the common law doctrine of equitable apportionment; (2) that the district court was incorrect in determining that the amount of damages to be awarded to appellees should not be affected by a post-trial two-year experimental program to ascertain if and to what extent certain of the damaging conditions underlying the judgment herein can be ameliorated; and (3) that the district court's method of computing damages was erroneous.

Inasmuch as we reverse the judgment below and order the entry of judgment for the appellant City, and as we base our holding upon the first issue, we need not and do not reach the latter two issues.

The Delaware River begins its flow within the bounds of New York State. The East Branch, which is entirely within New York State, and the West Branch, which is also entirely within New York State, except for approximately 8 miles above Hancock, N.Y., join at Hancock to form the main stream of the Delaware River. Thereafter the river flows in a generally southeasterly direction. Commencing about 4 miles south of Deposit, New York, the West Branch forms the boundary line between New York and Pennsylvania for approximately 8 miles, and thereafter the main stream forms the boundary line for some 68 miles to Port Jervis, N.Y. At Tri-State Rock, near Port Jervis, New York, the boundaries of





New Jersey, New York and Pennsylvania converge. Below Tri-State Rock the river constitutes the boundary between New Jersey and Pennsylvania, and at the head of Delaware Bay near Wilmington, Delaware it discharges into the Atlantic Ocean.

In order to meet its increasing need for supplies of public water New York City in 1929 began to plan the diversion of the waters of the Delaware River and its tributaries. Shortly thereafter, the State of New Jersey commenced an original suit in the U. S. Supreme Court against the State of New York and the City of New York to enjoin and restrain any diversion of the waters of the Delaware River and its tributaries. In its bill of complaint New Jersey alleged that the proposed diversion would deprive New Jersey "and its citizens as riparian owners along the Delaware River of the natural, unobstructed and undiminished flow of its waters in violation of their rights under the common-law," and would thereby "take the property of the plaintiff and its citizens without due process of law," in violation of the fourteenth amendment of the U.S. Constitution. New Jersey further alleged that the proposed diversion would substantially harm navigation, water power, sanitation, industrial use, oysters, fish, water supply, agriculture and recreation in the Delaware Valley basin.

The Commonwealth of Pennsylvania was permitted to intervene, *New Jersey v. New York I*, 280 U.S. 528 (1930), upon filing a Statement of Interest and Relief desired. In its statement Pennsylvania set forth its opposition to the application of the common law doctrine of riparian rights advocated by New Jersey inasmuch as that doctrine would prevent the

development and use of the Delaware River and its tributaries as a present and future source of water supply for Philadelphia and eastern Pennsylvania. Instead, Pennsylvania proposed a fair and equitable division of the waters of the Delaware River and its tributaries between the three states in accordance with the doctrine of equitable apportionment.

Following considerable testimony before Special Master Charles N. Burch, Esq., the Special Master prepared a report and recommended decree to the Supreme Court which was adopted and incorporated in the decision and decree entered on May 25, 1931. *New Jersey v. New York II*, 283 U.S. 805 (1931). The Decree, adopting the doctrine of equitable apportionment, limited New York's diversion to 440 million gallons daily (m.g.d.), and, as proposed by the Commonwealth of Pennsylvania, imposed a compensatory release plan. Under this plan, releases were required from New York reservoirs to maintain flows at Port Jervis, New York, at or above 1535 cubic feet per second (c.f.s.), and at Trenton, New Jersey, at or above 3400 c.f.s., provided that the maximum release required would be 30 per cent of the average diversion area's yield, or 402.6 c.f.s. The purpose of these releases was to protect downstream states from potential injuries to municipal, recreational and fishery uses, particularly during low-flow periods. The Decree also required the construction of a sewage treatment plant at Port Jervis. Paragraph 6 of the 1931 Decree provided that the Court's jurisdiction should be a continuing one and any party was authorized to apply subsequently for further action or relief, or for any modification of the Decree.





In April 1952 the City petitioned the Court to amend the 1931 Decree so as to allow an increase in the diversion of Delaware River waters of as much as 800 m.g.d. The States of New York, New Jersey, Pennsylvania and Delaware appeared as parties or as interveners, and the matter was referred to Special Master Kurt F. Pantzer, Esq. Following hearings before the Special Master and a lengthy series of negotiating sessions, the parties agreed to the terms of a consent decree to replace the 1931 Decree. This consent decree was reported by the Special Master and entered by the Court on June 7, 1954. *New Jersey v. New York IV*, 347 U.S. 995 (1954).

The 1954 Consent Decree authorizes the City of New York, following the completion of the Cannonsville Reservoir on the West Branch, to divert up to 800 m.g.d. subject to a new and somewhat different scheme for compensatory releases known as the "Montague Formula." This Formula requires the City to maintain certain minimum flows of water at Montague, New Jersey, approximately 75 miles downstream from the confluence of the East and West Branches of the River. The 1954 Decree further provides for certain excess releases depending upon the City's expected consumption of water, for the appointment of a River Master, and continues to require sewage treatment at Port Jervis. As in the 1931 Decree, the Court retained jurisdiction of the dispute, permitting the parties to apply for modification of the Decree, or for any pertinent supplemental orders. In 1961 the four basin states entered into a Compact creating the Delaware River Basin Commission (hereinafter "DRBC), Del. Code tit.7, §§ 6501-6511 (1974); N.J.Stat. Ann. §§ 32:11 D-1 to

D-110 (West 1963); N.Y. Envir. Conserv. Law §§ 21-0701 to -0723 (McKinney 1973); Pa. Stat. Ann. tit. 32, §§ 815.101—.106 (Purdon 1967), which Compact subsequently was approved by Congress, Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688 (1961).

The general purposes of the Compact are "to promote interstate comity; to remove causes of present and future controversy; to make secure and protect present developments within the states; to encourage and provide for the planning, conservation, utilization, development, management and control of the water resources of the basin; [and] to provide for cooperative planning and action by the signatory parties with respect to such water resources." (Delaware River Basin Compact, Art.I, par.1-3(e)).

Throughout Article 3 of the Compact, the Article setting forth the powers and duties of the Commission, there is constant reference to limitations upon the Commission, limitations deriving from the Decree of the United States Supreme Court in *New Jersey v. New York IV*, 347 U.S. 995. Though in extraordinary circumstances, such as drought, the Commission may direct increases or decreases in any allocation or diversion or release of water required by the above mentioned decree, it is clear that, except for such an emergency, the Commission may not act,—and nothing in the Compact shall be construed—in any way so as to impair, diminish, or otherwise adversely affect the rights, powers, privileges, conditions, and obligations contained in that decree. For instance, Article 3, Section 3.3 reads as follows:





> 3.3 Allocations, Diversions and Releases. The Commission shall have the power from time to time as need appears, in accordance with the doctrine of equitable apportionment, to allocate the waters of the basin to and among the states signatory to this compact and to and among their respective political subdivisions, and to impose conditions, obligations and release requirements related thereto, subject to the following limitations:
>
> (a) The commission, without the unanimous consent of the parties to the United States Supreme Court decree in New Jersey v. New York, 347 U.S. 995 (1954), shall not impair, diminish or otherwise adversely affect the diversions, compensating releases, rights, conditions, obligations, and provisions for the administration thereof as provided in said decree; . . . .

subject, however, to the emergency provision previously mentioned.

Moreover, in Article 3, Section 3.4, each of the signatory states waived or relinquished for the duration of the Compact, any right, privilege or power a state may have to apply for any modification of the terms of the Decree in *New Jersey v. New York IV*, which would increase or decrease the releases required, except through a proceeding in the Supreme Court to modify the Decree or in the event of an emergency such as drought.

Despite the terms of the 1954 Decree and the Compact, the district court below found, 450 F.Supp. 846 (1978), that the plaintiffs as riparian owners are entitled to the "full natural flow of the Delaware River," *id.* at 864, and that "riparian rights within a

state are purely a matter of that state's concern . . . and are not, *by that fact alone*, destroyed or altered when the Supreme Court applies federal common law *to conflicts between the states* and apportions the total waters of the stream among the various competing interests." *Id.* at 866. The district court noted that any *parens patriae* suit brought by one state against another state for the single purpose of protecting the property rights of its individual citizens would be barred by the Eleventh Amendment to the U. S. Constitution. From this the court below concluded that the Commonwealth of Pennsylvania could not have the rights of these individual plaintiffs adjudicated in the proceedings before the Supreme Court. Accordingly, the district court rejected the City's argument that under the federal common law doctrine of equitable apportionment, as applied by the Supreme Court in *New Jersey v. New York II, supra*, the rights of these Pennsylvania plaintiffs were adjudicated with those of the Commonwealth of Pennsylvania, barring recovery by them here.

We cannot agree with the district court's conclusions. A careful analysis of the nature of *parens patriae* suits between states in original proceedings before the Supreme Court convinces us that, as a party to the proceeding, Pennsylvania represented all of its citizens, *United States v. Nevada*, 412 U.S. 534, 539 (1973); *Hinderlider v. La Plata Co.*, 304 U.S. 92, 106 (1938); *Wyoming v. Colorado*, 286 U.S. 494, 506-507 (1932); *Kentucky v. Indiana*, 281 U.S. 163, 173 (1930); *Kansas v. Colorado*, 206 U.S. 46, 99 (1907), and that the terms of the decree are thus conclusive upon all Pennsylvania citizens and bind their rights.





The Supreme Court has rejected reasoning similar to that relied upon by the district court.[2] In *Wyoming v. Colorado, supra*, the State of Wyoming brought a suit against the State of Colorado to enforce a decree of the Court rendered in an earlier suit between the same states dealing with their relative rights to divert and use for irrigation the waters of the Laramie River. There the Court stated:

> But it is said that water claims other than the tunnel appropriation could not be, and were not, affected by the decree, because the claimants were not parties to the suit or represented therein. In this the nature of the suit is misconceived. It was one between States, each acting as a quasi-sovereign and representative of the interests and rights of her people in a controversy with the other. Counsel for Colorado insisted in their brief in that suit that the controversy was "not between private parties" but "between the two sovereignties of Wyoming and Colorado"; and this Court in its opinion assented to that view, but observed that the controversy was one of immediate and deep concern to both States and that the interests of each were indissolubly linked with those of her appropriators. 259 U.S. 468. Decisions in other cases also warrant the conclusion that the water

2 See *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935), where the Court rejected the notion that the U.S. Secretary of the Interior was a necessary party to original proceedings before the Court to apportion the waters of the North Platte River. Inasmuch as the position of the Secretary of the Interior is that of an appropriator of water for storage under the laws of Wyoming, the Court reasoned that "[h]is rights can rise no higher than those of Wyoming, and an adjudication of the defendant's rights will necessarily bind him. Wyoming will stand in judgment for him as for any other appropriator in that state."

> claimants in Colorado, and those in Wyoming, were represented by their respective States and are bound by the decree.

286 U.S. at 508-509 (footnote omitted).

It is indeed true that the standing of states to bring *parens patriae* actions on behalf of their citizens is limited by the Eleventh Amendment's prohibition against suits by citizens of one state against another state. Thus a state acting *parens patriae* may not invoke the Supreme Court's original jurisdiction to protect the individual rights of its citizens. *Pennsylvania v. New Jersey*, 426 U.S. 660, 665-666 (1976); *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 258-259 (1972); *Oklahoma v. Atchison, T. & S.F.Ry.*, 220 U.S. 277 (1911); *Kansas v. Colorado*, *supra*, 206 U.S. at 98-99; *Louisiana v. Texas*, 176 U.S. 1 (1900); *New Hampshire v. Louisiana: New York v. Louisiana* (companion cases), 108 U.S. 76 (1883); *Pennsylvania v. National Ass'n of Flood Insurers*, 520 F.2d 11 (3d Cir. 1975). Nor may a state sue to recover damages on behalf of its individual citizens. *North Dakota v. Minnesota*, 263 U.S. 365, 375-376 (1923). Rather, a suit may be brought by a state "for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain." *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).

Thus, appellees are correct in asserting that Pennsylvania could not have brought suit or intervened in the suit against New York to protect a mere collectivity of private riparian rights. But to draw from





this the conclusion that the individual interests of Pennsylvania's riparian owners were not represented in the suit and are thus not affected by the Decree is to ignore the obvious fact that the riparian rights of the appellees are not independent of Pennsylvania's rights in the waters of the Delaware River but rather are derivative therefrom and are subject to change by the laws of that state. *Connecticut v. Massachusetts*, 282 U.S. 660, 670 (1931). Thus, it necessarily follows that the rights of Pennsylvania citizens cannot exceed those of Pennsylvania itself[3] and the extent of Pennsylvania's rights in the Delaware River was conclusively determined by the terms of the Decree.

Appellees maintain that the Supreme Court Decrees and Compact provisions cannot be interpreted in such a way as to divest them of their riparian rights to the full natural flow of the Delaware River without just compensation. The fact is, however, that Pennsylvania never had a right to

---

3 The Supreme Court early established that a state cannot grant to private parties title to *land* which is later determined by interstate compact or Supreme Court decree to be beyond the true boundaries of the state. *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838); *Poole v. Lessee of Fleeger*, 36 U.S. (11 Pet.) 184 (1837). The Court made clear that such determinations by compact or decree affect the private property rights of the citizens of a state as well as those matters which pertain to a state's sovereignty over the land within the boundaries of the state. "Title, jurisdiction, sovereignty, are, therefore, dependent questions, necessarily settled, when the boundary is ascertained, which, being the line of territory, is the line of power over it." *Rhode Island v. Massachusetts*, *supra*, 37 U.S. at 733. In *Poole v. Lessee of Fleeger*, *supra*, the Court held that the fixing of the boundary does not result in a "divestiture" of citizens' titles to lands which were derived from grants under the state. Rather, the citizens' titles are invalid, *ab initio*, due to "an intrinsic defect of title in the states." 36 U.S. at 210.

an undiminished flow of the Delaware River. As the Supreme Court made clear in its Decree in 1931:

> A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. *And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the River might come down to it undiminished.* Both States have real and substantial interests in the River that must be reconciled as best as they may be.

283 U.S. at 342-343 (emphasis added)

It is manifest that a state cannot grant to private parties any privately owned property interest in riparian rights greater than the state's own property interest in them.[4] In *Hinderlider v. La Plata Co.,*

4 See footnote 3, supra; and we also reject the district court's reliance upon the following language in the Supreme Court's 1954 opinion in *New Jersey v. New York IV, supra,* to support its conclusion that the Supreme Court did not "*directly* rule on the effect of its Decrees on individual riparian owners." 450 Supp. at 865. "No diversion herein allowed shall constitute a prior appropriation of the waters of the Delaware River or confer any superiority of right upon any party hereto in respect of the use of the waters." 347 U.S. at 1004. To our mind, this language reflects merely that the Court did not intend to establish any permanent "superiority of right" in any party because that party at the time of apportionment under the 1954 Decree was granted rights in the water apportioned by the Decree. Rather, said apportionment was meant to be subject to future modifications due to changes in circumstances affecting





*supra,* a Colorado company claimed that an interstate compact allocating the waters of the La Plata River denied its right to appropriate the water under an earlier decree of a Colorado court, thereby depriving it of its property without just compensation. The Supreme Court rejected this claim, explaining:

> It may be assumed that the right adjudicated by the decree [of the Colorado court] to the Ditch Company is a property right, indefeasible so far as concerns the State of Colorado, its citizens, and any other person claiming water rights there. But the Colorado decree could not confer upon the Ditch Company rights in excess of Colorado's share of the water of the stream; and its share was only an equitable portion thereof.

304 U.S. at 102.

Appellees attempt to avoid the clear applicability of *Hinderlider* to the present case by arguing that while the Supreme Court decree may preclude them from seeking equitable relief in order to obtain water in excess of their State's share of the river waters, as was sought by the Ditch Company in *Hinderlider,*

the equities of the apportionment. See *Nebraska v. Wyoming,* 325 U.S. 589, 622-623 (1945.) This interpretation is borne out in part by the words of Special Master Burch in his Report to the Supreme Court in 1931 wherein he identified this language as *not* pertaining to the rights of the Delaware River Basin States: "I do not think that the mere fact that the State and City of New York are first in point of time in taking waters from the tributaries of the Delaware River gives any superiority of right. While the doctrine of priority of appropriation is applied in some of the arid states of the west and is part of the public policy of such states, I find no such principle obtaining in New York, New Jersey, or Pennsylvania," at 191.

the decree does not affect their right to damages for a diminished flow. We do not agree, for so to hold would hobble or possibly even destroy the effect of Supreme Court decrees or Congressionally approved interstate water compacts by subjecting those who rely upon the provisions of the decrees or interstate compacts to unreasonable damage burdens. What the Supreme Court decreed would be rendered nugatory by damage awards to private owners, a result inherently inconsistent with the supremacy of the Supreme Court's decree of equitable apportionment. Accordingly, we reverse the lower court's holding that New York City's diversion of waters, diversion done pursuant to the terms of the 1954 Supreme Court decree, was an actionable wrong which could form the basis for damages.

This does not end our discussion, however, for the district court further held that

> [e]ven if we accept for the sake of argument the contention that Pennsylvania riparians on the Delaware are presently enjoying the full volume of water to which they were ever entitled, the fact remains that the City by its dams has materially altered and worsened the remaining waters of the Delaware, that is, has worsened the portions allotted, under the City's arguments, to Pennsylvania, New Jersey and Delaware. . . . [T]he City's works have adversely affected the temperature, flow, stage and quality of the River. The Supreme Court's Decrees were certainly not intended as licenses for the City to commit such injuries without liability.

450 F.Supp at 867.





In order to comprehend more fully the effects that the City's diversions and compensatory releases have had upon plaintiffs' riparian properties, it is necessary to describe in greater detail the location of the City's dams in relation to plaintiffs' properties and the manner in which the Montague Formula, as set forth in the 1954 Decree, is being met.

Pursuant to the 1931 Decree and the 1954 Amended Decree, New York City constructed three dams. The first to be built was that on the Neversink River, a tributary of the Delaware River, entering the Delaware River at Port Jervis, N.Y., a point approximately 67 miles below the confluence of the East and West Branches of the Delaware River at Hancock and about 8 miles above Montague. Impoundment of the waters of the Neversink River by the City began in 1953. The second dam to be constructed was the Pepacton Dam on the East Branch of the Delaware River, impoundment beginning there in 1954. The third dam was the Cannonsville Dam on the West Branch of the Delaware River, impoundment commencing in 1963.

The Elwood (Van Loan) parcel is the only one of plaintiffs' parcels located above the confluence of the East and West Branches, it being situated on the West Branch 13.5 miles down stream from the Cannonsville Dam. The remaining four parcels are on the mainstream, ranging from six to thirty miles downstream from Hancock.

There is no requirement in the Amended Decree identifying the sources of the mandated minimum flow at Montague. Uncontradicted testimony at trial showed that the River Master (charged with enforcement of the Decree) has relied increasingly over the

years on power plant releases on the Mongaup and Lackawaxen Rivers to make up the required flow at Montague. However, these power plant releases are not subject to the River Master's control and fluctuate greatly in the amounts of water released from time to time. Moreover, when the River Master does call upon the City for releases to supplement the flow at Montague, the City has the discretion to release the water called for from any one or from all three of its reservoirs. Inasmuch as the power company releases and the Neversink Dam releases enter the Delaware River upstream of Montague but downstream from plaintiffs' properties, the flow of water past plaintiffs' premises on any given day is not directly assured by the provisions of the decree. Thus, while it is possible for the releases called for to maintain the Montague Formula to be fulfilled totally by the power plant releases, records indicate that the City has, in the past, made releases from the Cannonsville Reservoir which have approximated one billion gallons of water per day. 450 F. Supp. at 859. Thus, the district court found that there were substantial fluctuations on a daily basis in the flow of water as it passed by appellees' premises. The court also found that, inasmuch as the City's dams were constructed in such a way as to release water from the *bottom* of the dams, where the water temperature averages 40° Fahrenheit year-round, unaffected by air temperature, the river temperature in the summer in front of plaintiff's properties fluctuated between the upper 50's and the 70's, rendering the river suitable as neither a warm-water fishery nor a cold-water fishery. Also, it further found that the fluctuations in volume, stage, flow





and temperature of the river, produced by the City's meeting the Montague Formula, had adverse effects on swimming, boating, and the general ecology of the river, and, in particular, it noted the growth of slime, algae and mosquitoes along the river. *Id.* at 870-871.

The rights of appellees to collect damages for the City's acts relative to the waters of the Delaware River, as described above, depend upon the scope of rights granted to the City under the terms of the Decree and Compact. For, as we determined above, the rights of these Pennsylvania citizens are no greater than those of Pennsylvania, and they may not exceed Pennsylvania's rights to the extent that they interfere with the rights granted to the City under the terms of the Decree and Compact by placing an onerous price upon the exercise of those rights.

The question then becomes one of interpretation as to the scope of the rights granted to the City under the terms of the 1954 Decree and Compact. Put simply, New York City was given the right to divert 800 m.g.d. subject to certain conditions of river management. One must query whether these conditions were meant to be exclusive, specifically leaving to the City the right to exercise its discretion in choosing the means by which to meet these conditions of river management. Or did the Court merely establish a very general release scheme, setting forth only minimum standards of river regulation without intending to address specifically issues relative to the impact that the operation of such a general release scheme might have upon the various downstream riparian interests?

An analysis of the proceedings before the Special Masters and of the terms of the 1931 and 1954 Decrees convinces us that the Court intended to establish a comprehensive scheme of river regulation, all-inclusive as to all matters concerning the manipulation of the flow of the undiverted portions of the waters of the Delaware River. In arriving at the terms of the Decrees the Special Masters took into consideration numerous and varied factors, indicating distinctly "the nature of the problem of apportionment and the delicate adjustment of interests which must be made." *Illinois v. City of Milwaukee*, 406 U.S. 91, 106 (1972), (quoting *Nebraska v. Wyoming, supra*, 325 U.S. at 618). Evidence taken in the proceedings covered not only considerations of municipal water supply needs but also those of ecology, sanitation, fisheries, and recreation on and along the undiverted river waters.

Appellees maintain that their rights to the recreational value of the river properties could not have been and were not advanced in the proceedings before the Supreme Court. However, recreational interests, and the possibility that such interests would be harmed by the proposed diversion and release schemes, were advanced by the State of New Jersey on behalf of its citizens. And, indeed, such considerations played a major role in the Court's rejection of the New York plan of release, a reduction of the City's original request in 1931 for diversion of 600 m.g.d. to an allowed diversion of only 400 m.g.d. and in the requirement of sewage treatment.[5]

5 See page 146 of the Report of Special Master Charles N. Burch to the U. S. Supreme Court in the proceedings of *New Jersey v. New York II* (1931).





Moreover, to the extent that their properties were located across the river from those of the New Jersey riparian landowners, the interests of downstream Pennsylvania riparians in the recreational uses of the river were necessarily considered along with those of the New Jersey property owners.[6] That the recreational interests of Pennsylvania riparians, such as appellees, whose lands were farther upstream, were not stressed in either the 1931 or 1954 proceedings is due in large measure to Pennsylvania's emphasis in both proceedings upon the industrial and water supply needs of Philadelphia and southeastern Pennsylvania. This overriding concern of Pennsylvania was evident at several stages of the proceedings before the Court.

In the 1931 proceeding evidence presented by Pennsylvania pertained primarily to proof that no substantial damage would be caused by the New York diversion if taken pursuant to the Pennsylvania plan of impounding and release, a plan which was ultimately adopted by the Special Master as a better plan than that proposed by New York. The New York plan of release guaranteed only that there would be a total flow of 275 c.f.s. during every day of July, August, September and October immediately

6 On page 140 of his Report, Special Master Burch said with reference to the recreational value of Pennsylvania riparian lands: "In this connection it should be remembered that the State of Pennsylvania, on the opposite bank of the Delaware River from New Jersey, is just as much interested in any damage to the Delaware River as the State of New Jersey and, if any damage is sustained, those damages will be borne by Pennsylvania to the same extent as New Jersey, with the exception of damage to oyster beds. . . . The pleasure and recreational activities and developments appear to be greater on the Pennsylvania shore than on the New Jersey shore."

below the point of storage and that there would be a similar flow of 275 c.f.s. below the point of storage on every day during the remaining eight months when the water yield of the diversion area was less than 275 c.f.s.[7] Thus it appears that the New York plan of release proposed in 1931 would not have resulted in the sort of drastic fluctuation in flow, stage and temperature during the summer months which appellees now find to be so objectionable. It appears, however, that appellees' sovereign, Pennsylvania, made the policy decision to oppose this plan in favor of one providing for a greater stabilization of downstream river conditions.

In the 1954 proceedings Pennsylvania conceded that "no present injury will be done to it if New York builds the Cannonsville Reservoir, diverts 800 m.g.d. and releases water according to the Montague Formula." Indeed, the Commonwealth of Pennsylvania explicitly recognized the beneficial value of the Montague Formula to its citizens in its memorandum of December 7, 1976, presented to the District Court in response to that Court's request that the parties in the original action state their position with regard to New York Environmental Conservation Law §§ 15-0801 [1], 15-0805 [2] enacted in July 1976 (1976 N.Y. Laws ch. 888). This Conservation Law represented an attempt by the New York legislature to ameliorate the detrimental impact of New York City's release regime upon recreational uses of the Delaware River and its tributaries below the dams. In its memorandum, Pennsylvania opposed any new release regimen that would in any way threaten the

7 See Report of Special Master Burch at 55.





City's ability to meet the Montague Formula in periods of drought, stating that the

> [m]aintenance of the Montague Formula flows is vital for the protection of downstream municipal industrial, recreational, fishery and other uses. It is not simply a legal requirement but a physical necessity. During drought conditions, the releases provided under the Formula are crucial in assuring water supplies to southeastern Pennsylvania and southern New Jersey. Without adequate flow, saline intrusion migrates up the River from the estuary threatening both Philadelphia and Camden public water systems.

When one considers the cost to New York City of meeting the requirement of the Montague plan, it becomes apparent that Pennsylvania was indeed successful in demanding and securing for its citizens costly compensating benefits in exchange for the City's diversions. For instance, under the terms of the Decrees, the City is required to devote approximately 32% of the storage capacity of its three dams to assure adequate flows at Montague during dry or low-stage periods of the river, resulting in a 250% increase in the observed minimum flow of the river.[8] As counsel for appellant asserts without contradiction, the City's expenditure for that additional storage capacity alone cost it approximately $30 million.[9] In light of the City's costly disbursements

8 See page 82 of the Report of the Special Master Kurt F. Pantzer to the U. S. Supreme Court in the proceedings of *New Jersey v. New York IV*.

9 Appellant's Brief, p. 15.

for the benefit of the lower basin states, it hardly would appear equitable to require a supplemental outlay for the payment of damages to riparian landowners such as appellees.

That appellees do not receive the same benefits of stabilization in the stage and flow of the river as do downstream Pennsylvania riparians is simply a matter of intramural dispute over the distribution of water within the Commonwealth. Appellees cannot be allowed to collaterally attack, in this suit against New York City, the wisdom of the policy choices made by their sovereign in the representation of all of its citizens acting in its capacity of *parens patriae*.

In denying the City of Philadelphia's motion to intervene in the 1954 proceedings, the Court stated that

> the state, when a party to a suit involving a matter of sovereign interest, "must be deemed to represent all of its citizens." *Kentucky v. Indiana*, 281 U.S. 163, 173-174 (1930). The principle is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.

*New Jersey v. New York III*, 345 U.S. 369, 372-373.

Appellees cannot recover from New York City for what their own sovereign has ceded in their behalf. Their rights of recovery, if any, lie against Pennsylvania. In both the 1931 and the 1954 proceedings





before the Supreme Court, Pennsylvania did not oppose the diversions by the City provided the water was taken pursuant to the plans of impoundment and release which were in fact ultimately adopted by the Court. Moreover, in 1961, Pennsylvania entered into the Delaware River Basin Compact, the provisions of which deny the DRBC the power to

> [e]xercise any jurisdiction, except upon consent of all the parties [to the 1954 Supreme Court Decree] over the planning, design, construction, operation or control of any projects, structures or facilities constructed or used in connection with withdrawals, diversions and releases of waters of the basin authorized by said decree or of the withdrawals, diversions or releases thereunder.

Delaware River Basin Compact § 3.5(c).

The provisions of the compact further forbid the DRBC to "[i]mpose or collect any fee, charge or assessment with respect to diversions of waters of the basin permitted by said decree." *Id.* § 3.5(b).

To grant appellees damages for injuries to their riparian properties which arise from the City's meeting of the Montague Formula would amount to a total circumvention of these Compact provisions and would accomplish what would otherwise require the unanimous consent of all parties to the Decree.[10]

10 Appellees cannot be permitted to mount such a collateral attack seeking personal damages. For, as the Supreme Court stated in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 239 (1907), whether a state "by insisting upon [its claim in its capacity as quasi-sovereign] is doing more harm than good to her own citizens is for her to determine."

See also *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-341 (1958) (citations omitted):

The 1954 Decree specifically allows the City to maintain the required flow at Montague by releasing water from "*one or more* of its storage reservoirs in the upper Delaware watershed." *New Jersey v. New York IV*, *supra*, 347 U.S. at 997 (emphasis added). Thus the City is within its rights in choosing to meet the calls by the Special Master for additional water to maintain the flow at Montague by, for instance, releases entirely from the Cannonsville Reservoir.

The Decree does not address itself to the location on the dams to be constructed by the City of the apertures thereon from which impounded water is to be discharged, nor address itself to possible fluctuations in temperature which could result from placement of the apertures at the bottom of the dams. No party to the Decree raised this issue in the course of the proceedings before the Special Master. Indeed, it would appear that if the impoundment and release procedure does produce injurious fluctuations in water temperature, such an occurrence would be the sort of "unforeseen particular"[11] in anticipation of which the Court retained jurisdiction to allow for

---

The final judgment of the Court of Appeals was effective, not only against the State, but also against its citizens, including the taxpayers of Tacoma, for they, in their common public rights as citizens of the State, were represented by the State in those proceedings, and, like it, were bound by the judgment.

11 *New Jersey v. New York II*, *supra*, 283 U.S. at 344. See also, page 207 of the Report of Special Master Burch, note 5 *supra*, wherein he recommended that the Pennsylvania plan of release be approved, "subject to such modifications as actual tests and experience may indicate, and without prejudice to any party to this case to apply for modification."





further modifications of the terms of its Decree. However, by 1961 both the Neversink and Pepacton Dams had been completed; none of the parties to the Decree had applied for modification of its terms; and all the parties to the Decree had entered into the Delaware River Basin Compact, whose provisions further clarify the circumstances under which the parties to the Decree may apply to the United States Supreme Court for a modification of the terms of the Decree.

Curiously, appellees have placed great reliance upon the following language in the Compact: "Nothing contained in this compact shall be construed as affecting or intending to affect or in any way to interfere with the law of the respective signatory parties relative to riparian rights." *Delaware River Basin Compact*, Art. 14, § 14.19. However, to interpret this provision as intending to allow for an award of damages for injury resulting from conduct clearly authorized by the terms of the 1954 Decree would put this section of the Compact in unreasonable conflict with several other sections thereof. See *Delaware River Basin Compact*, Art. 3, §§ 3.3(a), 3.5. Accordingly, we construe this provision to mean no more than that, within the limits of the Supreme Court Decree, the private riparian owners may enforce riparian rights against anyone who violates them.

In short, appellees here have no direct means of obtaining the relief they request from appellant City for the injuries they complain of. If a remedy directed at moderating these variations in water temperature is now indicated, that remedy must now lie either in an application to the United States

Supreme Court by a party to the Decree for a modification of its terms or in an application to the DRBC by a signatory state to the Delaware River Basin Compact for a similar modification to the terms of the Compact, which application can only be entertained upon the unanimous consent of all of the parties to the Decree.

The judgments below are reversed.

28c(4894)

570—7-28-79 • USCA—4391

RECORD PRESS, INC., 157 Chambers St., N.Y. 10007, (212) 243-5775

# APPENDIX D

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

---

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of September one thousand nine hundred and seventy-nine.

Present: HON. STERRY R. WATERMAN

HON. WALTER R. MANSFIELD

HON. WILLIAM H. TIMBERS

Circuit Judges,

---

LILLIAN J. BADGLEY,
EMIL LAKE and HELEN LAKE,
GEORGE ELWOOD, Admr., ESTATE of B. VAN LOAN,
LLOYD and ELOISE L. CANFIELD,
GEORGE and HELEN GREGORY,
Plaintiffs-Appellees,

vs.

THE CITY OF NEW YORK,
Defendant-Appellant.

---

(Docket Nos. 78-7196 - 78-7200)

DOCKETED AS
A JUDGMENT # 80,0196
ON February 25, 1980

FILED SEP 27, 1979
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are reversed in accordance with the opinion of this court with costs to be taxed against the appellees.

A. DANIEL FUSARO,
Clerk

By: Arthur Heller,
Deputy Clerk

(A true copy,
A. Daniel Fusaro, Clerk
by Rolanne Henry,
Deputy Clerk



UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

(Docket Nos. 78-7196 - 78-7200)

September Term, 1978.

STATEMENT OF COSTS

Taxed in favor of Appellant, in

LILLIAN J. BADGLEY,
EMIL LAKE and HELEN LAKE,
GEORGE ELWOOD, Admr., Estate of B. VAN LOAN,
LLOYD and ELOISE L. CANFIELD,
GEORGE and HELEN GREGORY,

Plaintiffs-Appellees

vs.

THE CITY OF NEW YORK

Defendant-Appellant.

No. 385-389

| | |
|---|---|
| Docketing Action ..... | $ 250.00 |
| Cost of Printing Appendix ..... | 2,749.65 |
| Cost of Printing Brief ..... | 210.55 |
| Costs of Pringing [sic] reply Brief ..... | 81.90 |
| Taxed at the sum of .. | $3,292.10 |

A. DANIEL FUSARO,
.....
Clerk

BY: Arthur Heller,
Deputy Clerk

# APPENDIX E

APPENDIX E

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

---

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-third day of January, one thousand nine hundred and eighty.

Present: HON. STERRY R. WATERMAN

HON. WALTER R. MANSFIELD

HON. WILLIAM H. TIMBERS

Circuit Judges.

---

LLOYD and ELOISE L. CANFIELD,

Plaintiffs-Appellees 78-7199

v.

THE CITY OF NEW YORK,

Defendant-Appellant.

---

A petition for a rehearing having been filed herein by counsel for the appellees.

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

s/
A. DANIEL FUSARO, Clerk

FILED JAN 23 1980
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT



UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-third day of January, one thousand nine hundred and eighty.

----------X

LLOYD and ELOISE L. CANFIELD,

Plaintiffs-Appellees 78-7199

v.

THE CITY OF NEW YORK,

Defendant-Appellant

----------X

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees, and no active judge or judge who was a member of the panel having requested that a vote be taken

on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/
Chief Judge
IRVING R. KAUFMAN

FILED JAN 23 1980
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

# APPENDIX F

## APPENDIX F

## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED HEREIN

### U.S. CONSTITUTION

U.S. CONST. amend V provides, in pertinent part:

> "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. CONST. amend. XIV provides, in pertinent part:

> ". . . No state shall . . . deprive any person of . . . property, without due process of law...."

[APPENDIX F Continued]

DELAWARE RIVER BASIN COMPACT

1.6 Duration of Compact.

(a) The duration of this compact shall be for an initial period of 100 years from its effective date, and it shall be continued for additional periods of 100 years if not later than 20 years nor sooner than 25 years prior to the determination of the initial period or any succeeding period none of the signatory states, by authority of an act of its legislature, notifies the commission of intention to terminate the compact at the end of the then current 100 year period.

* * *

3.4 Supreme Court Decree; Waivers. Each of the signatory states and their respective political subdivisions, in consideration of like action by the others, and in recognition of reciprocal benefits, hereby waives and relinquishes for the duration of this compact any right, privilege or power it may have to apply for any modification of the terms of the decree of the United States Supreme Court in New Jersey v. New York, 347 U.S. 995 (1954) which would increase or decrease the diversions authorized or increase or decrease the releases required thereunder, except that a proceeding to modify such decree to increase diversions or compensating releases in connection with such increased diversions may be prosecuted by a proper party to effectuate rights,



powers, duties and obligations under Section 3.3 of this compact, and except as may be required to effectuate the provisions of paragraphs IIIB3 and VB of said decree.

* * *

14.19 Effect on Riparian Rights. Nothing contained in this compact shall be construed as affecting or intending to affect or in any way to interfere with the law of the respective signatory parties relating to riparian rights.

STATE CONSTITUTION

Pa. CONST. art. 1, § 10, provides in pertinent part:

> "[P]rivate property [cannot] be taken or applied to public use, without authority of law and without just compensation being first made or secured." (Emphasis supplied)

STATE STATUTES AND REGULATIONS

1 Smith, Laws Pa., provides:

V. Be it therefore enacted, and it is hereby enacted, That all and every the estate, right, title, interest, property, claim and demand of the heirs and devisees, grantees, or other claiming as Proprietaries of Pennsylvania, whereof they or either of them stood seized, or to which they or any of them were entitled, or which to them were deemed to belong, on

the fourth day of July, in the year of our Lord one thousand seven hundred and seventy-six, of, in or to the soil and land contained within the limits of the said late province, now state of Pennsylvania, or any part thereof, together with the royalties, franchises, lordships, and all other the hereditaments and premises compromised, mentioned and granted in the same charter, or letters patent of the said King Charles the second (except as herein after is excepted) shall be, and they are hereby vested in the commonwealth of Pennsylvania, for the use and benefit of the citizens thereof; freed and discharged, and absolutely acquitted, exempted and indemnified, of, from and against all estates, uses, trusts, entails, reversions, remainders, limitations, charges, incumbrances, titles, claims and demands, whatsoever, from, by or under the said charter, or letters patent, or otherwise, as fully, clearly, and entirely, as it the said charter, or letters patent, and the estates, interests, hereditaments and premises, therein comprised, mentioned and granted, and all other the estate, right and title of the said Proprietaries, of, in and to the same premises, were herein transcribed and repealed.

VI. And be it further enacted, That the said soil and lands, hereditaments and premises, and every part and parcel thereof (except as is herein excepted) from and after the date hereof, shall be subject to such disposal, alienation, conveyance, division and appropriation, as to this or any future legislature of this commonwealth, shall from time to time seem



meet and expedient, in pursuance of such law or laws as shall for that purpose hereafter be made and provided.

VII. Provided always, and be it enacted, That all and every the rights, titles, estates, claims and demands, which were granted by or derived from the said Proprietaries, their officers or others by them duly commissioned, authorized and appointed, or otherwise, or to which any person or persons, other than the said Proprietaries, were or are entitled, either in law or equity, by virtue of any deed, patent, warrant or survey, of, in or to any part or portion of the lands comprised and contained within the limits of this state, or by virtue of any location filed in the Land-Office, at any time or times before the said fourth day of July, in the year of our Lord one thousand seven hundred and seventy-six, shall be, and they are hereby confirmed, ratified and established for ever, according to such estate or estates, rights or interests, and under such limitations and uses, as in and by the several and respective grants and conveyances thereof are directed and appointed. (Emphasis supplied)

VIII. Provided also, and be it enacted, That all and every the private estates, lands and hereditaments, of any of the said Proprietaries, whereof they are now possessed, or to which they are now entitled, in their private several right or capacity, by devise, purchase or descent; and likewise all the lands called and known by the name of the Proprietary Tenths or Manors, which were duly sur-

veyed, and returned into the Land-Office, on or before the fourth day of July, in the year of our Lord one thousand seven hundred and seventy-six, together with the quit or other rents, and arrearages of rents, reserved out of the said proprietary tenths or manors, or any part or parts thereof, which have been sold, be confirmed, ratified and established for ever, according to such estate or estates therein, and under such limitations, uses, and trusts, as in and by the several and respective reservations, grants and conveyances thereof, are directed and appointed.

## Titles Confirmed

5 Smith, Laws Pa., provides:

Under the proprietaries' government, no title was considered as good in law until a patent was granted and enrolled in the rolls office. See an extract from a commission of the commissioners of property in the preceding pages, as also others in the land-office.

The reason is plain, because all warranties and applications were granted conditionally; which, if not complied with, the proprietaries or their commissioners, were at liberty, according to said conditions, to grant the land to others.

After the revolution the legislature, by the act of the 27th of November, 1779,



confirmed the titles, claims, or demands, which had been derived from the proprietaries or their officers, either in law or equity, "according to such estate, &c. as in and by the several and respective grants and conveyances thereof, ..c directed and appointed." And by the act of the 9th of April, 1781, patents are directed to issue to "all and every person or persons," &c. for lands for which no patents had been previously issued; provided the party applied within a limited time, which time has been extended until the 1st of January, 1811, after which time an additional interest is to be paid. By an act passed 30th of December, 1785, it was provided too, that no warrant should issue for any tract of land on which a settlement had been made, unless to such person or persons respectively, who had made the same, or their legal representative, until after the 10th day of April, 1788. The benefit of this act to such settlers, has also been extended till the said 1st of January, 1813, after which it will rest with the legislature to extend the provisions of said law, or make such farther regulations as they may deem necessary.

A patent was a grant complete both in law and equity, and as such confirmed by the act of 1779, to the holder, unless some fraud had been practised in obtaining it, or the land had been previously granted to some other person.

These unpatented proprietary rights have, in many cases, been considered su-

perior to rights acquired since the revolution; yet there are cases where equity would seem to ban such claims: that is, where an original applicant or warantee had not paid any purchase money or taxes, nor had ever taken possession of the land, or exercised acts of ownership on the same, and the person under the later right had done these things. In such cases it would be just to plead the original applicant's non-compliance, and the proprietaries' usages, as a bar to his recovery: and certain it is, that the later right under the practice of the proprietary's land-office would have been preferred. Nor does the acts of assembly confirm proprietary rights otherwise than according to the estate vested by said rights agreeably to the usages; of course it would be necessary to refer to original agreements, or the terms of warrants and applications, to know how to decide.

The legislature having sanctioned such claims, cannot again interfere until after the 1st of January, 1813, when they may again extend the time for payment, or make such other regulations as may be necessary, because after that time, persons claiming under proprietary rights will be in the power of the legislature, as much as they would have been in the power of the proprietaries, after they had failed to comply with the conditions, their warrants or applications were subject to.

In testimony that the foregoing extracts are correct, as stated, and that the notes subjoined are corresponding with the usages of the land-office, during the



proprietaries' government, to the best of my knowledge and belief, I have hereunto set may hand, at Harrisburgh, this 10th day of October, Anno Domini, 1812.

JOHN COCHRAN, Secretary
Land-Office.

N.Y.C. Admin. Code provides:

§ K51-26.0 Definitions; special provision concerning acquisition of real estate used for public purposes.--The term real estate as used in this article shall be construed to signify and embrace all uplands, lands under water, the waters of any lake, pond or stream, all water rights or privileges, and any and all easements and incorporated hereditaments and every estate, interest and right, legal and equitable, in land or water, including terms for years, and liens thereon by way of judgment, mortgages or otherwise, and also all claims for damage to such real estate. It shall also be construed to include all real estate (as the term is above defined) heretofore or hereafter required or used for railroad, highway or other public purposes, providing the persons or corporations owning such real estate or claiming interest therein, shall be allowed the perpetual use for such purposes of the same or of such other real estate to be acquired for the purposes of this article as will afford practicable route or location for such railroad, highway or other public purpose, and in the case of a railroad, commensurate with and adapted to its needs; and provided also

that such persons or corporations shall not directly or indirectly be subject to expense, loss or damage by reason of changing such route or location, but that such expense, loss or damage shall be borne by the city. In case any real estate so acquired, or used for public purposes, is sought to be taken or affected for the purpose of this article there shall be designated upon the maps referred to in the previous sections of this article, and there shall be described in the petition, hereinbefore referred to, such portion of the other real estate shown on such maps and described in such petition, as it is proposed to substitute in place of the real estate then used for such railroad, highway or other public purposes. Provided, that wherever the board of water supply has heretofore located on any map filed in the office of such commissions, a substituted route for any railroad, the same shall not be subsequently changed without the assent of such company. The supreme court at the special term to which the petition is presented or at such other special term as the consideration thereof may be adjourned to, shall either approve the substituted route or refer the same back to the board of water supply for alteration or amendment and may refer the same back, with such directions or suggestions as such court may deem advisable, and as often as necessary and until such commissioners shall determine such substituted route as may be approved by the court. An appeal from any order made by such court at special term, under the provisions of this section, may be taken by any person or corporation interested in and



aggrieved thereby to the appellate division and court of appeals, and shall be heard as a non-enumerated motion. The commissioners of appraisal, hereinbefore referred to, in determining the compensation to be made to the persons or corporations owning such real estate, or claiming interest therein, shall include in the amount of such compensation such sum as shall be sufficient to defray the expenses of making such change of route and location and of building such railroad or highway. Such commissioners of appraisal shall suggest in their report, and the court in the order confirming such report shall determine, subject to review by the appellate division, what reasonable time after payment of the awards to such persons or corporations shall be sufficient within which to complete the work of making such change. Neither the city, nor the board of water supply shall be entitled to take possession or interfere with the use of such real estate for the enumerated purposes, before the expiration of such time. Such time may be subsequently extended by the court (subject to review as aforesaid) upon a sufficient cause shown. After the expiration of this time so determined or extended no use shall be made of such real estate which shall cause pollution to the water in such reservoir or interfere with its flow.

§ K51-44.0 Damage to value of real property; businesses, and employees thereof.--

a. The owner of any real estate not taken by virtue of this article and arti-

cle eleven of the conservation law or of any established business on the first day of June, nineteen hundred five, except as hereinafter provided, and situate in the counties of Ulster, Albany or Greene, directly or indirectly decreased in value by reason of the acquiring of land by the city for an additional water supply or by reason of the execution of any plans for such additional water supply by the city under the provisions of this article and article eleven of the conservation law, their heirs, assigns or personal representatives shall have a right to damages for such decrease in value. The owner of any real estate not taken by virtue of this article or of any established business on the first day of December, nineteen hundred fourteen, except as hereinafter provided, situate in the counties of Ulster, Greene, Delaware or Schoharie, directly or indirectly decreased in value by reason of the acquisition, after the passage of this article, of land by the city for an additional water supply from the Schoharie watershed, or by reason of the execution of any plans for such additional water supply from such watershed, under the provisions of this article, his assigns or personal representatives, shall have a right to damages for such decrease in value. The owner of any real estate, not taken, situate in any one or more of the counties of Ulster, Delaware, Orange or Sullivan, or of any established business, directly or indirectly decreased in value by reason of the execution of any plans for or by the acquisition of land by the city for a water supply from the Rondout and Delaware watersheds except that portion of the Delaware watershed of the west branch of the Dela-



ware river within such counties, or any of them, and the owner of any real estate, not taken, situate in any one or more of such counties or situate in the corporate limits of the village of Deposit in the county of Broome existing on the first day of April, nineteen hundred fifty-nine, or of any established business, which business was established on or prior to the first day of April, nineteen hundred fifty-nine, which is directly or indirectly decreased in value by reason of the execution of any plans for or by the acquisition of land by the city for a water supply from the watershed of the west branch of the Delaware river, pursuant to law, his or its assigns, or personal representatives in any such case shall have a right to damages for such decrease in value, from the time of the beginning of such decrease in value, provided, however, that in the case of an established business, the recovery of or award made to any claimant shall not include any business that may have resulted by reason of the execution of any plans for such water supply. The board of water supply may agree with such person as to the amount of such damages, and if such agreement can not be made such damages, if any, shall be determined in the manner herein provided for the ascertaining and determining the value of real estate taken under the provisions of this article, and the commissioners shall not be limited in the reception of evidence to the rules regulating the proof of direct damages. They may also recommend such sums, if any, as shall seem to them proper to be allowed to parties appearing in the proceeding, as expenses and disbursements, including

reasonable compensation for witnesses. The amount of such damages so agreed upon as aforesaid or determined as aforesaid shall be payable and collectible in the same manner as is herein provided in the case of awards made through the confirmation of a report of commissioners of appraisal. . . .

New York Environmental Conservation Law § 15-0511, provides:

Statement of legislative findings and policy

1. . . . [T]he legislature hereby finds that the volume and abrupt changes in the volume of releases of water from impounding reservoirs of water have a capacity of more than one billion gallons [including the reservoirs involved in this case] and located in the counties of Delaware, Greene, Putnam, Schoharie, Sullivan, Ulster and Westchester have damaged the recreational uses, such as trout fishing and canoeing, of waters affected by such releases, that such waters are a recreational resource for residents from all parts of the state of New York and elsewhere, that such recreational resource benefits the economy and welfare of this state and that the volume and rate of change of volume of such releases can be regulated to protect and enhance the recreational use of waters affected by such releases while ensuring and without impairing an adequate supply of water for power production or for any municipality which uses water from such reservoirs for drinking and other purposes.

# APPENDIX G

MILES DOWNSTREAM FROM
CANNONSVILLE DAM
DOWNSVILLE DAM
CONFLUENCE
DRAINAGE AREAS, SQ. MI.
ORIGINAL
BELOW DAMS
% OF ORIGINAL
PARCEL
VAN LOAN 15.5 — — 622 172 27.7
BADGLEY 24.5 39.8 6.14 1216 595 43.8
LAKE 36.8 51.7 19.12 1636 815 49.8
GREGORY 39.1 54.4 20.75 1683 862 51.2
DURYEA 40.3 55.9 22.15 1689 868 51.4
CANFIELD 48.9 64.1 30.50 1830 1009 55.1
SCHOHARIE RESERVOIR
D.A. = 450 SQ.MI.
D.A. = 371 SQ.MI.
CANNONSVILLE RESERVOIR
PEPACTON RESERVOIR
ASHOKAN RESERVOIR
NEVERSINK RESERVOIR
RONDOUT RESERVOIR
WEST BRANCH RESERVOIR
KENSICO RESERVOIR
NEW YORK
PENNSYLVANIA
NEW JERSEY
CONNECTICUT
MASSACHUSETTS
VAN LOAN
BADGLEY
LAKE
GREGORY
DURYEA
CANFIELD
DELAWARE AQUEDUCT
HUDSON RIVER
NEW CROTON AQUEDUCT
OLD CROTON AQUEDUCT
SHANDAKEN TUNNEL
CATSKILL CREEK
ESOPUS CREEK
WALTON
DEPOSIT
HALE EDDY
HANCOCK
FISHS EDDY
DOWNSVILLE
MARGARETVILLE
BINGHAMTON
SUSQUEHANNA
UNADILLA RIVER
LYSANDER
DELAWARE RIVER
EAST BRANCH
WEST BRANCH
CALLICOON
LIBERTY
MONTICELLO
NARROWSBURG
BARRYVILLE
GODEFFROY
MONGAUP
ELLENVILLE
ROSCOE
WILLENRAUPACK
PORT JERVIS
MINISINK
DELAWARE WATER GAP
WALLPECK BEND
FLAT BROOK
BUSHKILL CREEK
SCRANTON
WILKES BARRE
SUSQUEHANNA RIVER
LEHIGHTON
BELVIDERE
EASTON
PHILLIPSBURG
BETHLEHEM
ALLENTOWN
HEGELSVILLE
MUSCONETCONG RIVER
FRENCHTOWN
RARITAN RIVER
NEW BRUNSWICK
RARITAN BAY
PRINCETON
LAMBERTVILLE
READING
PATTERSON
PASSAIC RIVER
SADDLE RIVER
HACKENSACK RIVER
NEWARK
NEW YORK CITY
LONG ISLAND
LONG ISLAND SOUND
BABYLON
OYSTER BAY
PORT JEFFERSON
TARRYTOWN
WHITE PLAINS
NORWALK
BRIDGEPORT
DANBURY
WEST POINT
PEEKSKILL
NEWBURG
POUGHKEEPSIE
HYDE PARK
KINGSTON
CATSKILL
HUDSON
GREAT BARRINGTON
CANAAN
HOUSATONIC RIVER
NAUGATUCK RIVER
CITY OF NEW YORK
BOARD OF WATER SUPPLY
DELAWARE RIVER
UPPER WATERSHED
IN RELATION TO THE
NEW YORK CITY WATER SUPPLY SYSTEM
0 4 8 12 16 MI.
NOVEMBER 23, 1930

# APPENDIX H

## APPENDIX H

## LEGISLATIVE HISTORY OF § 14.19 OF COMPACT

Delaware River Basin Advisory Committee Meeting Staff Summary of Discussion

4. Private Riparian Rights: Miller explained that the language of section 15.3* was drawn from the Federal Power Act, and that it had been added to the compact only to assuage the fears of those who may think that the compact will change private water rights. At the suggestion of Zimmermann the Committee agreed to insert existing before "law" in the third line; to substitute riparian for "private" in the fourth line; and, to strike everything following "rights" in the fourth line. It was also agreed to refer this section to the lawyers for review of language but not for substantive change. (Emphasis supplied)

Minutes of Delaware River Basin Advisory Committee

IV. Compact: Further discussion of Draft "D" of compact was the principal order of business. Deliberations followed an "Agenda of Policy Questions" dated October 12, 1960, which had been prepared by Mr. Miller and the staff. In the course of the meetings the following policy decisions were made regarding Draft "D":

---

* Now Compact § 14.19

* * *

2) The compact should contain a paragraph holding private riparian rights free from impairment or interference. The Committee agreed to delete the last fifteen words of section 15.3, which read as follows: ". . . in the control, appropriation, use or distribution of water or any vested right acquired therein". It was also decided to refer the language to the lawyers for review.

Memo of New York Joing Legislative Commission on Interstate Cooperation

The Commission is to make future allocations of the waters of the Basin among the four states and their political subdivisions in accordance with the Supreme Court doctrine of equitable apportionment which takes into account alternative sources, relative needs and changing uses. However, it should be noted that no allocation by the Commission is perpetual, nor may it be deemed to constitute a prior appropriation of the water of the Basin. Nor does the compact change present law relating to riparian rights.

Statement of Solicitor, City of Philadelphia, before Subcomm. No. 1 of the Comm. on the Judiciary on H.J. Res. 225, 87th Cong., 1st Sess.

The most significant feature of the proposed compact is its provision for an interstate-Federal commission. The reservoirs, expertise, and meaningful function



of the four States together with those of the Federal Government make possible, in a unique merger, the orderly direction and planning and control of the water resources of the Delaware Basin. This does not mean that the Commission would supplant existing governmental and private operations in the basin. Nor does it mean that any infringement on private riparian rights will occur. Rather, its impact and modus operandi are that all future developments of the basin, by whatever agency or at whatever governmental level, shall be in accordance with the comprehensive plan and operated in harmony with all water uses.

Summary of Major Provisions of Compact in H.J. Res. 225, 87th Cong., 1st Sess.

C. Make future allocations of the waters of the basin among the four States: and their political subdivisions in accordance with the Supreme Court doctrine of equitable apportionment which takes into account alternative sources, relative needs, and changing uses (sec. 3.3). (No allocation by the Commission is perpetual, nor may it be deemed to constitute a prior appropriation of the water of the basin (sec. 3.3(b)). The compact does not change present law relating to riparian rights (sec. 14.19). Also, no action may be taken by any signatory State or by the Commission without unanimous consent of the parties to the U.S. Supreme Court decree in New Jersey v. New York (347 U.S. 995 (1954)), or by unanimous action of the Commission in any emergency, that would in any way interfere with the diversions and

compensating releases authorized by the Court in its 1954 decree.) (Sec. 3.3(a)).

S. Rep. No. 985, 87th Cong., 1st Sess.

Section 14.19 preserves rights of signatory parties relating to riparian rights.

# APPENDIX 1

APPENDIX I

OFFICE OF THE MAYOR ABRAHAM D. BEAME

566-5090 220-76

For Immediate Release: Thursday, June 17, 1976

Mayor Abraham D. Beame today expressed his strong opposition to a bill that would empower the State Department of Environmental Conservation to take over control of the City's water supply to improve sport fishing conditions in upstate rivers and streams.

The bill would transfer from the City to the State Commissioner of Environmental Conservation the authority to control the volume and timing of water releases from New York City's upstate reservoirs.

* * *

Administrator Low noted that the City recently established a special task force which has been meeting every two

weeks with members of the State Environmental Conservation Department in an effort to provide better fishing conditions. He said:

"Owners of property along these streams have already been paid millions of dollars in settlements and condemnation awards for the reduction in flow necessitated by the construction of the City's reservoirs. In addition, we want to be good neighbors and want to insure good fishing conditions. We demonstrated this by agreeing to give more water than was provided for in the condemnation cases." (Emphasis supplied)

In expressing his opposition, the Mayor called attention to the City Corporation Counsel's opinion which states that the State of New York does not have the authority to take control over releases



from the three reservoirs in the Delaware River Basin.

These releases are under the control of a River Master appointed under a United States Supreme Court decree promulgated following extensive litigation involving the State of New York, the City of New York, New Jersey, Pennsylvania and Delaware.

The rights of the parties to the water of these three reservoirs are established in that Decree and it is the River Master who has control over releases into the Delaware River to maintain a prescribed flow at Montague, New Jersey.

# APPENDIX J

APPENDIX J

N.Y. TIMES, 9/30/79, Col. 1, p. 36

# A U.S. COURT UPSETS RULING AGAINST CITY

---

## Asserts Pennsylvania Landowners Must Ask for Damages There In Dam Building Case

---

By RONALD SMOTHERS

The United States Court of Appeals last week reversed a lower-court decision that would have required New York City to pay damages to five Pennsylvania landowners who had maintained that city-owned dams on the Delaware River in upstate New York had adversely affected their property.

The appeals court decision in Philadelphia, according to Allen G. Schwartz, the City Corporation Counsel, could cancel a number of similar pending claims that eventually could have cost the city $15 million.

The ruling reversed a March 1978 decision by Judge Charles L. Brieant of Federal District Court, who found that the city's diversion of nearly 800 million gallons of water a day near the source of the 410-mile river for its water supply had diminished the recreational and commercial value of the Pennsylvania residents' property.

"Their rights of recovery, if any, lie against Pennsylvania," the appeals court said.

## 1931 Compact Held Binding

In awarding $350,000 in damages and interest to the five Pennsylvania landowners, the lower court ruling had spurred other suits that, Mr. Schwartz said, eventually could have involved 10,000 New Jersey and Pennsylvania property owners.

The three-judge appeals panel, however, found that a 1931 compact between New York State, New Jersey and Pennsylvania that allowed the construction of three dams on the river as it flows through New York State was binding on all citizens of Pennsylvania. The court said that the rights of the individual landowners to the waters of the Delaware "are not independent of Pennsylvania's rights but are derivative therefrom."

The 1931 agreement, entered into by Pennsylvania and approved by the United States Supreme Court, would be broken, the appeals court said, if individual citizens of the state were allowed to attack "the wisdom of policy changes made by their sovereign in the representation of all its citizens."

Under the 48-year old compact, New York was allowed to build the Cannonsville Dam near Stilesville on the west branch of the river that shortly after forms the boundary between New York and Pennsylvania. The agreement also allowed construction of the Pepacton Dam on the river's east branch near Downsville, N.Y.



The two branches converge at Hancock N.Y., and flow south, with the river still the boundary between New York and Pennsylvania, until it reaches Port Jervis, turns sharply and becomes the border between Pennsylvania and New Jersey. A third dam, the Neversink, was built on a tributary that joins the Delaware River at Port Jervis. The three dams provide 50 percent of the city's water.

The tristate compact requires that the city's diversion of water not exceed 800 million gallons a day and the impact of the diversion is measured by a rivermaster stationed at Montague, N.J. The rivermaster takes his measurements at a point several miles south of the three dams as well as downstream from the property of the five plaintiffs.

## Changes Hurt Riverlife

Attorneys for the Pennsylvania landowners argued that the city practice of releasing water from points south and downstream of their property had assured the daily flow requirements at the measuring station but it did not assure them a minimum flow. The result, they said, was abrupt changes in the river flow at those points which had damaged trout fishing, canoeing and diminished the value of the Pennsylvania residents' property.

The lower court, according to Jack Weinberg, the lawyer representing one of the five plaintiffs, found that since New York State had seen fit to pay partial damages to New York residents across the

river from Pennsylvania who were adversely affected by the water release practices, it should also pay Pennsylvania residents. The lower court also found that the city practices had in fact adversely affected the quality of the river and violated the common law maxim that "property must be used in such a way as not to injure the property of others."

The appeals panel did not rule on whether the city had in fact damaged the river, but it instead upheld the primacy if the 1931 agreement. The panel noted that it was clear that, in negotiating the compact, Pennsylvania had been more concerned with maintaining a minimum river flow south and downstream of the area in which the five plaintiffs lived. It was that policy decision by the state, said the panel, which the landowners should take issue with.

Mr. Weinberg said that he and other attorneys representing the plaintiffs would decide later this week on whether to appeal.

# APPENDIX K

## APPENDIX K

City's Revenues From Water Charges, As Reflected In The Comptroller's Reports

| Period | Amount of Water Charges |
|---|---|
| Fiscal 1977 | $164,824,345.00 |
| Fiscal 1975-76 | $174,355,460.98 |
| Fiscal 1974-75 | $190,572,753.67 |
| Fiscal 1973-74 | $124,709,120.54 |
| Fiscal 1972-73 | $176,937,063.56 |
| Fiscal 1971-72 | $180,295,486.83 |
| Fiscal 1970-71 | $157,974,876.09 |

# APPENDIX L

## SUPREME COURT RECORDS

Report of the Special Master to this Court in New Jersey v. New York

It is true that in the argument of the case before me counsel for New York expressed the ability and willingness of the City of New York to pay damages to anyone injured in New Jersey, though at the same time denying that there would be any injury to anyone in New Jersey, or to anyone in New York owning property anywhere near the New Jersey line. The willingness, however, to pay compensation in New Jersey would not render lawful or rightful the taking of property or the injuring of property in New Jersey. In other words, one is not at liberty to injure another merely by showing an ability and willingness to pay damages. City of New York v. Pine, 185 U.S. 107. (Special Master's Report at 23)

* * *

The bill also alleges that the City has not changed its water rates since 1856, notwithstanding the increased cost of construction, operation and maintenance of water supply since that time. Nevertheless the bill alleges said City operates its water system at a profit, to-wit, a profit of more than $800,000.00 in 1925 and more than a million dollars in 1926.

New York City admits that it has not changed its water rates since 1856 and substantially admits the profits on the water system as alleged in the bill. (Special Master's Report at 41)

* * *

Connecticut v. Massachusetts Record

21. Answering the twenty-first paragraph, set forth on page 11 of the printed bill of complaint, the defendant, the Commonwealth of Massachusetts, denies each and every material allegation of fact contained in said paragraph. And further answering, the defendant says that any diversion of the flood waters of the Ware River and of such waters of the Swift River as the said Commonwealth plans to divert is within the sovereign and riparian rights of said Commonwealth and authorized by the laws of said Commonwealth and by the laws of the United States of America, and that in nowise is the State of Connecticut, as parens patriae or in its own right, or are the citizens of the State of Connecticut deprived of any of their rights or property, either contrary to law or without due process of law. And the defendant further alleges that by virtue of the provisions of the acts of the Great and General Court of the Commonwealth of Massachusetts, hereinbefore referred to, authorizing the said diversions, due and adequate pro-



vision is made for the payment of compensation, not only to citizens of the Commonwealth of Massachusetts but also to citizens of the State of Connecticut, who may suffer any damage by reason of the said diversion, whether such damage be suffered within the Commonwealth of Massachusetts or within the State of Connecticut; and the defendant further alleges that by the common law of the Commonwealth of Massachusetts, as set forth in the leading case of Manville Co. v. City of Worcester, reported in the 138th Massachusetts Reports, at page 89, a remedy is given not only to citizens of the Commonwealth of Massachusetts but to citizens of the State of Connecticut for damages suffered within their borders by virtue of any diversion authorized by the said Commonwealth. And the defendant says that the said remedies in the courts of the Commonwealth of Massachusetts at common law and by virtue of the acts of the Great and General Court, above referred to, constitute a full, sufficient, and adequate remedy at law which may be prosecuted by the State of Connecticut or any inhabitants thereof.

* * *

Hinderlider v. La Plata Record

1. Plaintiff's counsel seems to concede that this is not an action for damages, but is for injunction; and that no [fol. 78] judgment for damages can be rendered. As this action is brought by

the corporation only, while the principal damages (if damages should be recoverable) accrue to the individual farmers, separately, that concession of plaintiff's counsel seems to be right.

Supreme Court, U. S.
FILED
MAY 19 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1644

LLOYD F. and ELOISE L. CANFIELD,

Petitioners,

-against-

THE CITY OF NEW YORK,

Respondent.

# BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI

ALLEN G. SCHWARTZ,
Corporation Counsel of
the City of New York,
100 Church Street
New York, N.Y. 10007
212-566-4338 (or 4375)

L. Kevin Sheridan,
Morris Einhorn,
of Counsel.

May 15, 1980

TABLE OF CONTENTS


| | Page |
|---|---|
| Jurisdiction | 1 |
| Questions Presented | 2 |
| Statement of the Case | 3 |
| Opinions Below | 11 |
| POINT I | |
| THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED CONCERNING ANY TAKING FROM PENNSYLVANIA CITIZENS OF THE FLOW OF NEW YORK'S WATERS APPORTIONED THAT STATE BY THIS COURT | 17 |
| POINT II | |
| THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED AS TO DENIAL OF EQUAL PROTECTION | 43 |
| Conclusion | 50 |




CASES CITED


| | Page |
|---|---|
| Arizona v. California, 373 U.S. 546 (1963) | 19 |
| Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) | 19 |
| Carson v. Blazer, 2 Binney 475, 4 Am. Dec. 463 | 32 |
| City of Philadelphia v. Commonwealth, 130 A. 491 (1925) | 32 |
| City of Tacoma v. Taxpayers, 357 U.S. 320 (1958) | 21 |
| Coffee v. Groover, 123 U.S. 1 (1887) | 35 |
| Colorado v. Kansas, 320 U.S. 383 (1943) | 18,19,22 26 |
| Conn. v. Massachusetts, 282 U.S. 660 (1931) | 18,20 |
| Hinderlider v. La Plata Co., 304 U.S. 92 (1938) | 18,21,22, 28,36 |
| Illinois v. City of Milwaukee, 406 U.S. 91 (1972) | 19 |
| Kansas v. Colorado, 185 U.S. 125 (1902) | 38 |

| | Page |
|---|---|
| Kansas v. Colorado, 206 U.S. 46 (1907) | 19,22,36 |
| Knight v. U.S. Land Assoc., 142 U.S. 161 (1891) | 33 |
| La Plata R. & C. Co. v. Hinderlider, 25 P. 2d 187 (1933) | 22 |
| Mtr. of Syracuse v. Gibbs, 293 N.Y. 275 (1940) | 46 |
| Nebraska v. Wyoming, 325 U.S. 589 (1945) | 21,23 |
| New Jersey v. New York, 283 U.S. 336 (1931) | 11,18,20, 37 |
| New Jersey v. New York, 345 U.S. 369 (1953) | 4,21,26, 37 |
| New Jersey v. New York, 347 U.S. 941, 995 (1954) | 9 |
| New York Univ. v. Amer. Book Co., 197 N.Y. 294 (1910) | 49 |
| Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) | 39 |







| | Page |
|---|---|
| Pine v. City of N.Y., 112 Fed. 98 (2d Cir., 1901), rvsd. 185 U.S. 93 (1902) | 38 |
| Pollard's Lessee v. Hagan, 3 How. (44 U.S.) 212 (1845) | 31,35 |
| Poole v. Fleeger, 11 Pet. (36 U.S.) 185 (1837) | |
| Rhode Island v. Mass., 12 Pet. 657 (1838) | 30,37 |
| Rundle v. Del. and Raritan Canal Co., 55 U.S. 80 (1852) | 32 |
| St. Clair v. Lovington, 23 Wall. 46 (1874) | 32 |
| Security Bldg. & Loan Assn. v. Carey, 259 App. Div. 42 (4th Dept., 1940), affd. 286 N.Y. 646 (1941) | 48 |
| Shively v. Bowlby, 152 U.S. 1 (1894) | 32 |
| State v. Knapp, 207 P. 2d 410 (1949), 167 Kan. 546 | 20 |
| Strobel v. Kerr Salt Co., 164 N.Y. 303 (1900) | 23 |

| | Page |
|---|---|
| Town Board v. City of Poughkeepsie, 22 AD 2d 270 (2d Dept., 1964)..... | 49 |
| United States v. Nevada, 412 U.S. 534 (1973)..... | 21,27 |
| Water Power Co. v. Water Comrs., 168 U.S. 349 (1898)..... | 32 |
| Wyoming v. Colorado, 259 U.S. 419 (1922)..... | 22,39 |
| Wyoming v. Colorado, 286 U.S. 494 (1932)..... | 21,37 |
| Zahn v. Internatl. Paper Co., 414 U.S. 291 (1974)..... | 10 |







| | Page |
|---|---|
| United States Constitution | |
| Eleventh Amendment..... | 26 |
| United States Statutes | |
| 8 Stat. 54, 80..... | 34 |
| State Statutes | |
| New York - Env. Conserv. Law, §§21-0701 et seq., 15-0801 et seq..... | 13 |
| N.Y.C. Admin. Code, ch. 51, Title K..... | 43,45 |
| Del. River Basin Comm., Annual Reports 1977, 1978..... | 14 |
| N.Y.C. Comptroller's Annual Report for fiscal 1974-75..... | 49 |

IN THE
SUPREME COURT OF THE UNITED STATES

---

OCTOBER TERM, 1979

---

No. 79-1644

---

LLOYD F. and ELOISE L. CANFIELD,

Petitioners,

-against-

THE CITY OF NEW YORK,

Respondent.

---

# RESPONDENT'S BRIEF IN OPPOSITION

## Jurisdiction

The judgment of the Court of Appeals (Second Circuit) was entered September 27, 1979 and a petition for rehearing suggesting rehearing en banc was denied January 23, 1980 (1d, 1e, 3e).* Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

*Numerals in parentheses followed by small letters (i.e., 1d) refer to pages of Petitioners' Appendix.

## Questions Presented

1. Where this Court, in a dispute between States over the waters of an interstate river, equitably apportions to the upstream State (New York) a share of the flow from its tributaries thereto, subject to costly terms and conditions for water purification and releases to provide the downstream States a vastly increased and dependable year-round flow, may riparians in those downstream States claim the right to the full natural flow of the river as though such apportionment had never been made?

2. Where riparians in a downstream State claim that the release regime urged by their State and embodied in a decree

of this Court is injurious to their property, did the Court of Appeals properly hold that they must look to their State for revision thereof either by modification of this Court's decree or by action of the Basin States through their compact?

3. Where New York requires the City of New York to compensate New York riparians only for using the entire share of the flow thus apportioned to that State by this Court, are riparians in the downstream States thereby denied equal protection of New York's laws?

## Statement of the Case

(1)

The Delaware River is a 410-mile interstate stream originating in the Catskill Mountains of New York wherein the East and West Branches of the River are located. In



1929 New Jersey commenced an original action in this Court to enjoin New York from proceeding with a planned diversion to the City of New York (hereafter City) of 600 million gallons daily (mgd) from New York's East Branch and four other New York tributaries (Neversink, Willowemoc, Little Delaware, Beaver Kill) to the Delaware.

A Special Master was appointed. Pennsylvania intervened, opposing application of the common-law rule of riparian rights to the Delaware "since that proposition threatened the right of Philadelphia and Eastern Pennsylvania to continue their use and development of the Delaware River." New Jersey v. New York, 345 U.S. 369, 374 (1953). It urged application of the doctrine of equitable apportionment, and that New York be required to impound the surplus waters of winter and spring so as to provide

Philadelphia, Trenton and the lower Delaware with a compensating flow during the dry (summer and fall) season - Pennsylvania stating that its interests would be protected "if the water is taken pursuant to the Pennsylvania plan of impounding and release" (City App., pp. 4-5).*

The "prayer of the Pennsylvania intervention for the application of the doctrine of equitable apportionment" was approved by the Special Master and granted by this Court (ibid., pp. 7, 8-10). His report, confirmed by this Court, found that "any possible claim which could be made under the Fourteenth Amendment is eliminated by the modification

*The position of each State in the proceedings before this Court, the Special Master's reports therein, the decisions of this Court, the terms of its Decrees, as well as of the Compact subsequently adopted by the Delaware River Basin States in 1961, are more fully detailed in the City's Appendix submitted herewith.



herein made of the New York plan of diversion" - New York being enjoined from diverting more than 440 mgd (from its East Branch and Neversink River). New York was also required to construct a sewage treatment plant at Port Jervis, N.Y. (Tri-State Rock where N.Y., Pa. and N.J. converge) to purify the flow downstream, and to provide reservoirs sufficient to impound surplus waters of Spring for releases to maintain the "summer river" at a constant flow of 998 mgd at Port Jervis, or triple the lowest stage (322 mgd) previously recorded (ibid., pp. 6-10).

(2)

In 1951, New York applied to this Court for an equitable apportionment of 360 mgd from its West Branch for City use, i.e., a total of 800 mgd. This

time New Jersey supported the requested equitable apportionment of flow from the West Branch on condition that a more favorable release regime (Montague formula) be adopted to increase the constant flow at Montague, N.J. (2 miles from Port Jervis), and that New Jersey be apportioned 100 mgd without compensating releases (City App., pp. 13-15).

Upon agreement between New Jersey and Pennsylvania for construction of a reservoir at Wallpack Bend (between those two States) to impound 756 mgd of Delaware River water for their joint use, and subject to adoption of the Montague formula, Pennsylvania agreed, as well. A consent decree was entered by this Court in 1954 on recommendation of its Special Master, Delaware being also a party thereto (ibid., pp. 17-23). As was stated by Pennsylvania



in its brief - "Pennsylvania concedes that no present injury will be done to it if New York City builds the Cannonsville Reservoir (on the West Branch), diverts 800 mgd, and releases water according to the Montague formula" (Pa. br. to SM, pp. 31, 20-21; SM Report, pp. 24-26).

In addition to erecting a sewage treatment plant at Port Jervis, the 1954 consent decree required the City to build reservoirs sufficient to provide, in accordance with the Montague formula, a permanent constant flow of 1,131 mgd at Montague, plus supplemental releases (based on surplus waters from its entire Croton, Catskill and Delaware systems) sufficient to raise that flow to 1,722 mgd (City App., pp. 20-23). As New Jersey acknowledged - "[t]he beneficial effects of improved river regulation and of the supplementary releases on potable water

supply, sanitation, fish life, and recreation for the whole length of the river below the New York City dams provides adequate compensation for any losses which the State of New Jersey may suffer due to increased diversion of Delaware River water by New York City," and that the City would be subjected to enormous costs to provide the compensating flow thus assured the lower States (City App., pp. 16-17; Record before this Court in 1952 proceeding [Ex. AZ herein], pp. 1072-3, 1057).

The 1954 consent decree (347 U.S. 941, 995) enjoined New York from diverting more than 800 mgd from its tributaries; required storage capacity for "compensating releases" pursuant to the Montague formula, and a water purification plant; apportioned New Jersey 100 mgd from its tributaries to the Delaware without compensating releases;



and appointed a River Master to assure compliance with the release regime (City App., pp. 20-23).

(3)

In December of 1971 petitioners, as owners of land in Pennsylvania (Wayne County) on the upper Delaware, commenced a class action against the City in the Southern District of New York on behalf of all similar property owners in the downstream States "numbering in the thousands."* They sought damages on the ground that the share of the flow from New York's tributaries, apportioned that State by this

*While class action status was denied on authority of Zahn v. Internatl. Paper Co., 414 U.S. 291, 302 (1974), the Court conducted a joint trial with 4 other Pennsylvania riparians (Elwood, Lake, Badgley, Gregory), on whose behalf a companion petition has been filed with this Court for a writ of certiorari. The City's brief herein responds to both petitions.

Court, was a taking of their property therein, and that they were also damaged by the release regime adopted in behalf of the downstream States. As stated by petitioners Elwood, et al - "the release scheme devised and found to be applicable by this Court is not specific. Rather, said scheme is general," and inadequate for the upper Delaware (Elwood pet., p. 30).

Opinions Below

a. District Court. The District Court held that "the rights of the individual plaintiffs could not have been advanced by Pennsylvania" in New Jersey v. New York, 283 U.S. 336 (1931), 347 U.S. 995 (1954). Consequently, as to them, the authorized "diversions of such enormous quantities of water from the River and out of the Delaware watershed is unreasonable" (26a-27a; 73a-74a, 69a).



In any case, and even if plaintiffs were not entitled to the share of the flow apportioned to New York, the release regime adopted by this Court to benefit the lower Delaware was found to have worsened the flow in the upper Delaware, the flow past plaintiffs' property being "not directly assured by the provisions of the Decree and of the Compact" (81a, 38a; 41a; 94a-95a). Plaintiffs were then held entitled to the "full natural flow of the Delaware River" free of "thermal pollution" due to variations in water temperature caused by releases; and despite the program newly commenced by the DRBC to adjust those releases to remedy any adverse effect upon the upper Delaware, the Court predicted that "massive fluctuations in temperature, flow and velocity produced by the City's meeting the Montague formula would still occur"

(41a; 45a-49a; 102a-104a). The diversion and/or releases being "tantamount to condemnation," total damages of $336,303, plus post-judgment interest and costs were awarded the 5 Pennsylvania riparians (126a; 125a-137a).

---

[N.B. As noted by the District Court (45a), in 1976 New York sought to regulate releases from 30 reservoirs in 7 of its counties "to protect and enhance the recreational use of water affected by such releases" (L. 1976, cc. 888, 889; N.Y. Env. Conserv. Law, §§15-0801[1], 15-0805 [2]). This Court requested memoranda from the parties to the amended decree as to the impact thereof upon the Montague formula (45a). While Pennsylvania insisted that "[m]aintenance of the Montague Formula flows is vital for the protection of down-



stream municipal, industrial, recreational, fishery and other uses. It is not simply a legal requirement, but a physical necessity" to assure water supplies to southeastern Pennsylvania and prevent saline intrusion - it stated that the proper tribunal was the DRBC (23c; Pa. Mem., pp. 6, 12-14). When this Court advised the River Master that it would take no action, the DRBC promulgated a release program (45a-46a). The DRBC's annual reports for 1977 (pp. 6-7) and 1978 (p. 12), state that "through increased and more equal distribution of releases, more gradual stream fluctuations, and special extra releases to protest aquatic life," its release program to improve the upper Delaware had "exceeded expectations" and would be continued.]

b. Court of Appeals. Reviewing the two prior proceedings before this Court culminating in the 1954 consent decree, the Court of Appeals held that the terms thereof are "conclusive upon all Pennsylvania citizens and bind their rights" (10c; 5c-9c). The Court pointed out that Pennsylvania could neither grant to its citizens, nor recognize, any rights in the flow of interstate waters greater than Pennsylvania's own share therein - "'and its share was only an equitable portion thereof'" (14c-15c; 10c-12c). Hence, the diminished flow resulting from an equitable apportionment by this Court of an interstate stream created no "actionable wrong" (16c).

As to damages for releases pursuant to the Montague formula, the Court noted that New York's release regime would have



primarily protected the upper Delaware; but that Pennsylvania's release plan and the Montague formula ultimately adopted, reflected Pennsylvania's primary concern with the "industrial and water supply needs of Philadelphia and southeastern Pennsylvania" (20c-22c). As a result, said the Court, "Pennsylvania was indeed successful in demanding and securing for its citizens costly compensating benefits," and that policy decision "for a greater stabilization of downstream river conditions" may not be collaterally attacked by Pennsylvania water claimants in a suit against the City (23c-24c). Pointing out that the City had fully complied with the Montague formula, the opinion states that any inadequacies therein must be remedied by Pennsylvania upon application to the Supreme Court or through its compact (26c,

28c). The Court concluded that - "Appellees cannot recover from New York City for what their own sovereign has ceded in their behalf. Their rights of recovery, if any, lie against Pennsylvania" (24c).

## POINT I

### THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED CONCERNING ANY TAKING FROM PENNSYLVANIA CITIZENS OF THE FLOW OF NEW YORK'S WATERS APPORTIONED THAT STATE BY THIS COURT.

(1)

The law with respect to rights of a State and its citizens in the flow of interstate waters has been firmly settled by this Court. The contention of an upstream State "that she could dispose of all the water within her borders, and owed no obligation to pass any of them" to a downstream State was flatly rejected, as was that of the lower State "that she was



entitled to have the stream flow as it flowed in a state of nature" - "the lower State is not entitled to have the stream flow as it would in nature regardless of need or use." Colorado v. Kansas, 320 U.S. 383, 385, 393 (1943); see Connecticut v. Massachusetts, 282 U.S. 660, 669-670 (1931); Hinderlider v. La Plata, 304 U.S. 92, 101-103 (1938).*

Such conflicts between the States over the flow of their interstate waters have been resolved with due regard to their sovereignty. "International law is no alien in this tribunal.* * * Sitting

*It was again stated in New Jersey v. New York, 283 U.S. 336, 343 (1931), that although New York has the power to cut off all the water within its jurisdiction, "the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the River might come down to it undiminished."

as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law and international law, as the exigencies of the particular case may demand." Kansas v. Colorado, 206 U.S. 46, 96-98 (1907). Pursuant thereto, "[t]he measure of the reciprocal rights and obligations of the States was declared to be an equitable apportionment of the benefits of the river." Colorado v. Kansas, 320 U.S. 383, 385 (1942).*

*"The doctrine of equitable apportionment is a method of resolving water disputes between States. It was created by this Court in the exercise of its original jurisdiction over controversies in which States are parties." Arizona v. California, 373 U.S. 546, 597 (1963). "Rights in interstate streams, like questions of boundaries, 'have been recognized as presenting federal questions' (Hinderlider v. La Plata Co., 304 U.S. 92, 110. The question of apportionment of interstate waters is a question of 'federal common-law' upon which state statutes or decisions are not conclusive." Illinois v. City of Milwaukee, 406 U.S. 91, 105 (1972); see Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426-7 (1964); Arizona v. California, 373 U.S. 546, 564, 597 (1973).



That rule applies regardless of the fact that "different traditions and practices prevailing in different parts of the country may lead to varying results," since "the effort always is to secure an equitable apportionment without quibbling over formulas." New Jersey v. New York, 283 N.Y. 336, 343 (1931). The law applied by a particular State to its own waters being subject to change by that State in accordance with its own policies, is not controlling in resolving disputes between States over their interstate waters. Connecticut v. Massachusetts, 282 U.S. 660, 670-1 (1931); cf. State v. Knapp, 207 P. 2d 410, 447 (1949), 167 Kan. 546; Baumann v. Smrha, 145 F. Supp. 617, 624-5 (D.C. Kan., 1956).

When the flow of an interstate stream is thus apportioned by this Court, water claimants in a lower State are bound

by the allocation to the upstream State. And such apportionment by this Court does not require that State to appropriate, take or seize the share apportioned it, but defines and limits the rights to the flow of each State and its citizens, who "were represented by their respective States and are bound by the decree." Wyoming v. Colorado, 286 U.S. 495, 506-9 (1932); see United States v. Nevada, 412 U.S. 534, 539 (1973); Nebraska v. Wyoming, 325 U.S. 589, 615-616, 627 (1945), 295 U.S. 40, 43 (1934); New Jersey v. New York, 345 U.S. 369, 372-3 (1953); Hinderlider v. La Plata Co., 304 U.S. 92, 106, 107 (1938); City of Tacoma v. Taxpayers, 357 U.S. 320, 340-1 (1958). Thus, when Kansas riparians sued water claimants in Colorado for "taking" the flow of interstate waters previously determined to be within Colorado's equitable share thereof, this Court enjoined



all such actions. Colorado v. Kansas, 320 U.S. 383, 388-390 (1942); see, Wyoming v. Colorado, 259 U.S. 419, 464 (1922). In short, the law of a particular State - whether by its Constitution, statutes or decisions - cannot confer upon its citizens rights in interstate waters in excess of that State's share, "and its share was only an equitable portion thereof." Hinderlider v. La Plata Co., 304 U.S. 92, 94, 102 (1938); cf. La Plata River & Ditch Co. v. Hinderlider, 25 P. 2d 187, 188-9, 191 (1933).

(2)

As this Court long ago held, where a State accepts the common-law rule of riparian rights pursuant to which impoundments and appropriate releases by an upstream riparian are recognized, "she cannot complain if the same rule is administered between herself and a sister State." Kansas v. Colorado, 206

U.S. 46, 104-5 (1907).*

In effecting "an equitable apportionment of the benefits" of the Delaware River to achieve that "delicate adjustment of interests which must be made" (Nebraska v. Wyoming, 325 U.S. 589, 618, 627 [1945]), this Court apportioned New York 800 mgd from the surplus or flood stages of its own tributaries on condition that a reservoir capacity of sufficient size (269 billion gallons [BG]) be created to store heavy Spring runoffs for basic permanent releases of 85 BG (32% of capacity) during the dry season, plus 70 BG (26% of capacity) for supplemental releases (City App., pp. 17-20).

*That a State adhering to the common-law rule of riparian rights will determine reasonable use of an intra-state stream and condition such use on the upstream riparian's creating sufficient reservoir capacity for releases "in time of scarcity," and purification of the waters so released, see Strobel v. Kerr Salt Co., 164 N.Y. 303, 320-1 (1900).



Apart from the beneficial impact upon flood control of such huge reservoirs, the compensating releases thus required pursuant to the Montague formula had the far more beneficial effect of assuring the lower States a dependable water supply for their major cities (Philadelphia, Camden, Trenton) during the summer and fall when subsidence of the river's natural flow not only reduces their available water supplies but due to inflow of ocean salinity, threatens complete destruction thereof - as Pennsylvania but recently reminded this Court (ante, pp. 13-14). In addition, New York was required to purify the waters for the lower States by constructing a sewage treatment plant at Port Jervis (ante, p. 8). Pennsylvania and New Jersey (which was apportioned 100 mgd without providing any compensating flow)

both expressed their satisfaction with the equitable apportionment of the river's benefits effected by this Court (ante, pp. 8-9). And the enormous cost to the City of providing such compensating benefits to the lower States in compliance with "the conditions and obligations" imposed by the amended decree, was fully recognized by them, as well (ibid.).

(3)

In seeking certiorari to review the decision of the Court of Appeals holding Pennsylvania water claimants bound by this Court's equitable apportionment of the flow of New York's tributaries to the Delaware, petitioners rely upon a number of fallacious propositions. It is first said, for example, that - "This Court has not explicitly ruled on the right of riparian owners to claim



compensation for property damages caused by diversions authorized by equitable apportionment decrees" (Pet., p. 9). Petitioners simply ignore the fact that such actions by Kansas riparians against citizens of Colorado for diversions held within Colorado's equitable share of interstate waters were enjoined in Colorado v. Kansas, 320 U.S. 383, 388-391 (1942).

Similarly fallacious is their contention that Pennsylvania was barred by the parens patriae doctrine and the Eleventh Amendment "from representing individual riparian damage claims" (Pet., p. 9). As this Court pointed out in New Jersey v. New York, 345 U.S. 369, 372 (1953), the parens patriae rule not only serves to protect citizens, barred by the Eleventh Amendment from suing a sister State, but "has aspects which go beyond mere restate-

ment of the Eleventh Amendment; it is recognition of the principle that the State, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens.'" And this, because it was Pennsylvania's obligation, and not that of this Court, "to evaluate all the separate interests within Pennsylvania" in formulating its policy, and no citizen of Pennsylvania could challenge any apportionment of interstate waters to a sister State there adjudicated - "Otherwise a state might be judicially impeached on matters of policy by its own subjects" (345 U.S. at p. 373).*

*"For the purpose of dividing the waters of an interstate stream with another State, Nevada has the right, parens patriae, to represent all the non-federal users in its State insofar as the share allocated to the other State is concerned." United States v. Nevada, 412 U.S. 534, 539 (1973). See cases cited ante, p. 21.



It is next contended that petitioners "have vested property rights in the natural flow of the entire River," so that any diminution thereof through "the device of equitable apportionment permits the destruction of individual riparian property without just compensation" (Pet., pp. 9, 10-11). Petitioners are said to have vested rights in the natural flow of the Delaware which "an equitable apportionment decree cannot defeat" (Pet., p. 12). And this, because those rights were not dependent on Pennsylvania law, but "were derived from the Crown and vested in individual landowners during the colonial period" (Pet., p. 12).*

*Thus, the holding in Hinderlider v. La Plata Co., 304 U.S. 92, 106 (1938) that - "whether the apportionment of the water of an interstate stream be made by compact between the upper and lower States with the consent of Congress or by a decree of this Court, the apportionment is binding upon the citizens

(footnote cont'd. on next page)

We put aside the self-evident fact that in equitably apportioning the benefits of the Delaware by allowing New York a share of its own headwaters thereof, compensation on a grand scale was required - the obligation to provide reservoir capacity for compensating releases to benefit the lower States, as well as a purification plant. Petitioners' position that riparian rights in inter-colonial waters were "unaffected by territorial boundaries"; included a "distinct property right in the natural flow" thereof independent of public

---

* (footnote cont'd. from previous page)

of each State and all water claimants, even where the State had granted the water rights" prior thereto - is distinguished on the ground that "in western states (unlike the thirteen colonial states) the rights of riparians may be no greater than the rights granted to them by their respective states" (Pet., p. 13).



rights in those waters; and that such vested private rights to the natural flow were unaffected by the Revolution, i.e., "the transfer of territory by the Crown did not affect vested private property rights" (Pet., pp. 12-13, 14) - rests upon several misconceptions and distortions of law.

While divine inheritance may have rendered the natural flow of inter-colonial waters the private property of the king and his grantees, when the colonies declared their independence as sovereign States, they could neither accord nor recognize greater rights in common or interstate waters than they were entitled to - "the title of a state is sovereignty, full and absolute dominion; 2 Peters 300, 301; the title of an individual such as the state makes it by its grant and law." Rhode Island v. Massachusetts, 12 Pet. (37 U.S.) 657, 734

(1838). And while the sovereignty declared by the original States enabled each of them to fashion its own laws with respect to common or interstate waters, such laws could not extend beyond that State's share thereof. As stated in Pollard's Lessee v. Hagan, 3 How. (44 U.S.) 212, 229 (1845) - "But her rights of sovereignty and jurisdiction are not governed by the common-law of England as it prevailed in the colonies before the Revolution, but as modified by our own institutions. In the case of Martin and others v. Waddell, 16 Peters 410, the present chief justice in delivering the opinion of the court, said: 'When the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, sub-



ject only to the rights since surrendered by the Constitution." See, St. Clair v. Lovington, 23 Wall. 46, 64, 68 (1874).*

Petitioners insist, nevertheless, that each of the 13 colonies, upon proclaiming its independence and sovereignty and subsequently effecting a peace treaty in

*"In Delaware, as has been declared by its Supreme Court 'all navigable rivers within the State belong to the State, not merely in right of eminent domain, but in actual propriety.'" Shively v. Bowlby, 152 U.S. 1, 23 (1894). And as Pennsylvania advised this Court in New Jersey v. New York, 283 U.S. 336 (1931) [Pa. br., p. 32] - "Pennsylvania has never applied the rule of common-law riparian rights to its large interstate rivers such as the Delaware and Susquehanna. The local law respecting these interstate waters has followed the civil law," so that they are public waters, precluding compensation for any public use thereof unless expressly authorized by statute. See Rundle v. Del. and Raritan Canal Co., 55 U.S. 80, 91, 94 (1852); Carson v. Blazer, 2 Binney 475, 4 Am Dec. 463; Water Power Co. v. Water Comrs., 168 U.S. 349, 371-3 (1898); Shively v. Bowlby, 152 U.S. 31-32, 46 (1894); cf. City of Philadelphia v. Commonwealth, 130A. 491, 493-4 (1925).

recognition thereof, was obliged by international law to protect "vested private property rights" in the natural flow of inter-colonial waters, so as to preserve such rights in behalf of citizens of the other States. They thus cite Knight v. U.S. Land Association, 142 U.S. 161, 183-4 (1891) for the proposition that "the transfer of territory by the Crown would not affect vested private property rights" (Pet., p. 14). In that case, which involved "conquest from Mexico in 1846," the United States was held bound by treaty and international law "to protect all rights of that territory emanating from the Mexican government" - so that upon admission of California to statehood, it could not claim the right to tidelands previously conveyed by Mexico to the pueblo of



San Francisco and which was "claimed by the city of San Francisco as successor of the Mexican pueblo of that name" (142 U.S. at pp. 184-4).

Petitioners' "analogy" fails to recognize that in the peace treaty of 1783 following the Revolutionary War, the king acknowledged each of the 13 original States as "free, sovereign and independent States; that he treats with them as such; and for himself, his heirs and successors relinquishes all claims to the government, proprietary and territorial rights of the same" (8 Stat. 54-55, 80-81). The territories of those States were not annexed by conquering States to their own domains; nor was there any grant or cession to them of their own territories, previously declared free, sovereign and independent of the "ceding" power. And the crown could neither grant

nor cede to any of them rights in the territories of another State. Nor could it oblige any of those States to recognize a prior proprietary grant, to its former subjects in another colony, of the full natural flow of that State's own waters preemptive of the right of every sovereign State to an equitable share thereof. And there is no rule of international law requiring even a conquering State to recognize any such preemptive grant in its own waters, previously made by the vanquished nation, to subjects in territories ceded by the latter to that conquering State.*

*Even where a State acquires territory by "cession," it is "subject to the constitution and laws of its own government and not according to those of the government ceding it." Pollard's Lessee v. Hagan, 3 How. (44 U.S.) 212, 225 (1845); Coffee

(footnote cont'd. on next page)



In short, none of the 13 original States was obliged by treaty or international law to recognize any proprietary grant preemptive of its own right to an equitable share of its interstate waters. The Constitution adopted in 1787 limited every State to settling its claims to the flow of waters from another State by compact approved by Congress, or by decree of this Court. Kansas v. Colorado, 206 U.S. 46, 97-98 (1907); Hinderlider v. La Plata Co., 304 U.S. 92, 104-6 (1938). When obliged to resolve such claims, this Court took full cognizance of and applied rules of international law. It recognized the limits of each State's power over the

* (footnote cont'd. from previous page)

v. Groover, 123 U.S. 1, 10-11 (1887); see cases cited, ante, p. 32, showing that Pennsylvania itself recognized no such proprietary right, even of its own citizens, in its own share of the Delaware.

flow of interstate waters, and that no State could grant or enforce "rights" therein in excess of that State's share of such waters - "and its share was only an equitable portion thereof." Hinderlider v. La Plata Co., 304 U.S. 92, 102 (1938); New Jersey v. New York, 283 U.S. 336, 342-3 (1931). The title of a private water claimant being "such as the state makes it by its grant and law" (Rhode Island v. Massachusetts, 12 Pet. [37 U.S.] 657, 734 [1838]) - all such claimants are necessarily "represented by their respective States and are bound by the decree" entered by this Court in a proceeding resolving such disputes among States over their rights to the flow of interstate waters by an equitable apportionment thereof. Wyoming v. Colorado, 286 U.S. 494, 508-9 (1932); New Jersey v. New York, 345 U.S. 369, 372-3 (1953).



Thus, the conditions and obligations imposed upon New York for its share of its own tributaries to the Delaware, via a purification plant and sufficient reservoir capacity to provide a compensating flow far greater than the natural flow of the "summer river" to benefit the lower States and assure their cities a dependable water supply, are binding upon petitioners and they are not entitled to more.*

*In stating that the Court of Appeals "declined to follow its own decision" in Pine v. City of N.Y., 112 Fed. 98 (2d Cir., 1901), petitioners fail to recognize that New York had there unilaterally diverted interstate waters (Pet., pp. 14, 15). While this Court reversed the injunction against New York to permit it to settle claims for which it "is legally responsible, a proposition upon which we express no opinion" (185 U.S. 93, 107-8 [1902]), on that same day it also decided to take proof as to the share of interstate waters to which each State was entitled in Kansas v. Colorado, 185 U.S. 125, 146-7 (1902). And 5 years later, the rule of equitable apportionment was first applied

(footnote cont'd. on next page)

(4)

Petitioners next baselessly contend that the decision of the Court of Appeals negates a provision of the 1961 compact "which expressly preserves riparian rights along the Delaware" (Pet., pp. 9, 11-12). We put aside the fact that the compact adopts this Court's rule of equitable apportionment, authorizing the DRBC to allocate Basin waters "in accordance with the doctrine of equitable apportion-

* (footnote cont'd. from previous page)

in that case (206 U.S. 46 [1907]) - described as "a pioneer in its field." Wyoming v. Colorado, 259 U.S. 419, 464 (1922). Thus, the Court below properly recognized a vast distinction between an upper State's unilateral allocation to itself of an interstate stream and an equitable apportionment thereof on conditions and obligations imposed by this Court. Similarly pointless is petitioners' reliance on Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363, 371-2 (1977) for the proposition that vested property rights are "not subject to later defeasance by operation of any doctrine of federal common law" (Pet., p. 16), since petitioners had no vested property rights in New York's waters.



ment"; that it precludes any modification of the Amended Decree "except upon the consent of all the parties to said decree"; and that damages for any water project undertaken pursuant to the compact are payable solely by the Commission and not by any State or political subdivision thereof (City App., pp. 24-27; Compact, pars. 3.3, 3.4, 3.5, 14.14).

It is apparent, however, that the language of §14.19, that the compact is not intended to "affect or in any way to interfere with the law of the respective signatory parties relating to riparian rights," does not enlarge the law of any Basin State so as to endow its riparians with rights in the flow of interstate waters beyond the power of that State to confer. And as already shown, Pennsylvania law could not confer upon its riparians any rights in the

flow of New York's waters or to its share thereof as determined by this Court. The Court of Appeals did not, therefore, negate §14.19 of the compact in holding that New York's right to the share of the flow accorded it by the 1954 consent decree upon compliance with the conditions and obligations there imposed, was unaffected by §14.19 of the compact (27c).

(5)

Although the River Master's annual reports to this Court show that the City has fully complied with the release regime (Montague formula) established by this Court in its 1954 consent decree, petitioners nevertheless seek damages from the City for the inadequacy thereof in protecting the upper Delaware. As the Court of Appeals pointed out herein - New York's rejected



release plan was aimed at protecting the upper Delaware; the Pennsylvania release plan and Montague formula, successively adopted in the 1931 and 1954 Decrees, were primarily aimed at assuring major cities in Pennsylvania and New Jersey on the lower Delaware a dependable year-round supply of potable water; while objecting to New York's attempt to rearrange releases to better protect the upper Delaware, Pennsylvania advised this Court that the Basin Commission established by the compact could best resolve the matter (ante, pp. 13-16; 20c-28c). And the Basin Commission's action in redirecting releases under the Montague formula so as to protect the upper Delaware has been highly successful (ante, p. 14).

There is no denial of due process in holding petitioners bound by the release

regime consented to by Pennsylvania as in its over-all best interests, and that they must look to Pennsylvania for any modification thereof by this Court or by the Basin States through their compact.

## POINT II

### THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED AS TO DENIAL OF EQUAL PROTECTION.

(1)

Petitioners claim denial of equal protection, saying that the Court of Appeals' decision "denies thousands of landowners outside New York the same protections afforded New York landowners," the City being obliged to compensate New York riparians for diverting New York's share of its tributaries to the Delaware (Pet., p. 8; also pp. 4, 11; N.Y.C. Admin. Code [6 Williams 1971 ed.], §§K51-26.0, K51-44.0).



As already detailed, this Court's apportionment to New York of an equitable share of its tributaries to the Delaware imposed upon the City the obligation to provide enormous reservoir capacity sufficient to impound surplus Spring runoffs for compensating releases to the lower States, thereby assuring their citizens a dependable water supply during the dry season, as well as controlling Spring floods, and to purify the waters downstream from Port Jervis (ante, pp. 4-9). That these measures were principally directed at beneficial river regulation in behalf of the lower Basin States and subjected the City to enormous expense therefor is self-evident and was, in fact, conceded by New Jersey and Pennsylvania (ante, pp. 8-9). But even ignoring the fact that such compensating benefits

were not primarily directed at protecting riparians in New York, that State had no duty to impose the further obligation upon the City to compensate riparians in the lower Basin States who had no rights in the flow of waters in New York allotted to that State by this Court and beyond the share to which their States were thus held entitled.

In short, while New York may permit the City to preempt 100% of that State's allotted share of the flow of its tributaries to the Delaware - on condition that the City compensate New York riparians for their loss thereof and furnish their communities with an adequate water supply, presently approximating 100 mgd (N.Y.C. Admin. Code, §K51-42.0) - there is no denial of equal treatment in affording no such benefits



to communities or riparians in the lower Basin States who have no rights in New York's equitable share of its waters as apportioned by this Court.*

Finally, petitioners deem it necessary to "expose" the Court of Appeals as overly concerned with the City's fiscal crisis and the "unreasonable damage burdens" portended by their novel quest to impose damages upon it in behalf of out-of-State riparians for the share of interstate waters allotted New York (Pet., p. 15). Thus, petitioners cite a newspaper report to the effect that the

*New York "may, at will, grant, withhold, or condition the privilege to a municipality of taking water from a public source," and simultaneously reserve the right to divert such waters to other communities. Mtr. of Syracuse v. Gibbs, 283 N.Y. 275, 283, 286-7 (1940).

City's liability to "10,000 New Jersey and Pennsylvania property owners" would not likely exceed $15 million, whereas "the Court of Appeals overlooked the fact that the City sells the water that it diverts" and derives "substantial revenues" therefrom (Pet., p. 15).

Assuming the relevancy of these plainly diversionary "arguments," it is unnecessary to resort to sources de hors the record to recognize that the damages awarded by the District Court herein ($336,000) and averaging $67,000 for each of the 5 Pennsylvania riparians at the joint trial, portend a City liability of $335,000,000 ($67,000 x 5,000) - even if only half the "10,000 New Jersey and Pennsylvania property owners" be taken into account.



In stating that "the City sells the water" and derives "substantial revenues" therefrom, petitioners are quick to add "that the City's costs are not relevant" in determining profitability and consequent "liability" to compensate petitioners for rights they do not have in the flow of interstate waters apportioned to New York (Pet., p. 15). This, of course, baselessly assumes that such "rights" depend in some manner upon whether the City or a private water company owns the Croton, Catskill and Delaware systems supplying the City's water and makes a private or public "profit" therefrom. "Water rents and charges may be collected either as taxes or as compensation for water consumed." Security Bldg. & Loan Assn. v. Carey, 259 App. Div. 42, 46 (4th Dept.,

1940), affd. 286 N.Y. 646 (1941); see N.Y. Univ. v. American Book Co., 197 N.Y. 294, 297 (1910).*

Petitioners' ad hominem arguments on the "minor" cost to the City of damages

*Petitioners' Appendix (1k) lists City water revenues in each of 7 years, "As reflected in the Comptroller's Reports" - the largest such revenues being $190 million in fiscal 1974-5. The same Report for that year shows that expenses of the City's Environmental Prot. Admin. for water and water pollution control ($68,627,000) plus debt service on the plant devoted thereto ($97,877,000), totalled $166,504,000 (Annual Report of N.Y.C. Compt. for 1974-5, pp. 118-119, 483). Moreover, the original cost of the City's water supply system (land, dams, aqueducts, mains) was $1.7 billion (ibid., p. 561), and it "may earn from and out of such operation an amount equivalent to taxes" payable if the plant were privately owned, plus a "fair return on the value of the property used and useful in such public service" (Town Board v. City of Poughkeepsie, 22 AD 2d 270, 272-3 [2nd Dept., 1964]), i.e., on its current value estimated in excess of $5 billion. One must therefore resort to sheer semantics to equate even the City's highest "substantial revenues" with "profits."



to thousands of riparians in the lower Basin States, and the enormous "profitability" of its water supply system, are thus as speciously founded as their contentions on denial of due process and of equal protection.

## Conclusion

The petition for a writ of certiorari should be denied.

Dated: May 15, 1980

Respectfully submitted,

ALLEN G. SCHWARTZ
Corporation Counsel of
the City of New York,
Attorney for Respondent.

L. Kevin Sheridan,
Morris Einhorn,
of Counsel.

Supreme Court, U. S.
FILED
MAY 27 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1644

LLOYD F. and ELOISE L. CANFIELD,

Petitioners,

-against-

THE CITY OF NEW YORK,

Respondent.

# SUPPLEMENTAL BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI

ALLEN G. SCHWARTZ,
Corporation Counsel of
the City of New York,
100 Church Street
New York, N.Y. 10007
212-566-4338 (or 4375)

L. KEVIN SHERIDAN,
MORRIS EINHORN,
of Counsel.

May 22, 1980

TABLE OF CONTENTS


| | Page |
|---|---|
| Preliminary Statement | 1 |
| a. Delaware baselessly assumes that riparians in downstream States have property rights in the flow equitably apportioned New York of its own waters | 2 |
| b. Interstate agreements are not jeopardized by the Court of Appeals' decision | 6 |
| Conclusion | 14 |


CASES CITED


| | |
|---|---|
| Colorado v. Kansas, 320 U.S. 383 (1944) | 5, 10 |
| Harrisonville v. Dickey Clay Co., 289 U.S. 334 (1933) | 3 |
| Hinderlider v. La Plata Co., 304 U.S. 92 (1938) | 4-5 |
| Nebraska v. Wyoming, 295 U.S. 40 (1954) | 5, 7 |
| New Jersey v. New York, 283 U.S. 336 (1931) | 10 |


CASES CITED


| | Page |
|---|---|
| New Jersey v. New York, 347 U.S. 995 (1954) | 6 |
| Pine v. City of N.Y., 185 U.S. 93 (1902) | 3 |
| Shively v. Bowlby, 152 U.S. 1 (1894) | 7 |
| U.S. v. Gerlach Live Stock Co., 330 U.S. 725 (1950 | 3 |

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1644

LLOYD F. and ELOISE L. CANFIELD,

Petitioners,

-against-

THE CITY OF NEW YORK,

Respondent.

SUPPLEMENTAL BRIEF OPPOSING
PETITION FOR A WRIT OF CERTIORARI

Preliminary Statement

This supplemental brief is necessitated by the fact that subsequent to submission of its brief opposing the instant petition, the City of New York (City) was served with an amicus brief for the State of Delaware by counsel simultaneously representing Hackensack Water Company as amicus. As we will show, Delaware's concern over the uncompensated "taking" of its riparians' rights to the flow of New York tributaries as apportioned that State by this Court is both baseless and diversionary - as is its contention that participation in management of the Delaware River Basin "has been prejudiced by the decision below" (Del. br., pp. 3, 4).

a. Delaware baselessly assumes that riparians in downstream States have property rights in the flow of New York's waters equitably apportioned that State.

In urging that certiorari be granted, Delaware asserts that the Court of Appeals' decision is the first to bar "recovery for compensatory damages against the upstream taker"; "conflicts with prior decisions of

this Court"; and that it imputes "a legal consequence to the decree not previously recognized" (Amicus br., pp. 5, 8, 10).

Significantly, although the doctrine of equitable apportionment was formulated at the turn of the century, and has been applied on numerous occasions to State conflicts over interstate streams, none of the petitioners nor the amici herein has been able to find or cite a single case wherein damages were awarded any water claimant in one State for the share of the flow apportioned another State by this Court.* Delaware never-

*Harrisonville v. Dickey Clay Co., 289 U.S. 334 (1933), cited by Delaware (br., p. 6) involved California's intrastate waters, as fully detailed in U.S. v. Gerlach Live Stock Co., 330 U.S. 725, 728-9 (1950). And no equitable apportionment of interstate waters was involved in Pine v. City of N.Y., 185 U.S. 93 (1902), similarly cited by Delaware (br. p. 6). See City's Main Br., p. 38.



theless insists that the Court of Appeals "extended the principle of Hinderlider to deny riparian owners the remedy of compensatory damages" for "infringement on riparian rights" (Amicus br., pp. 5, 6). It simply overlooks the fact that this Court there flatly rejected the contention that a Colorado water claimant's "vested property right" in the flow of an interstate stream was unaffected by an equitable apportionment thereof between two sovereign States "except by a condemnation proceeding and payment of compensation" (304 U.S. at p. 102; see 25 P. 2d at 191).

As was there made clear, since Colorado "possessed the right only to an equitable share of the water in the stream," an equitable apportionment of that stream's flow to another State "can

not have taken" from Colorado's water users any vested rights therein since they had none (304 U.S. at p. 108). The rights of Delaware riparians to the flow of New York's tributaries "can rise no higher" than those of Delaware. Nebraska v. Wyoming, 295 U.S. 40, 43 (1935). "The lower State is not entitled to have the stream flow as it would in nature regardless of need or use." Colorado v. Kansas, 320 U.S. 383, 393 (1944).

In short, far from being the first decision to bar private recovery for the flow apportioned another State by this Court, or conflicting with "prior decisions of this Court," there has been no such recovery in the 80 years since the equitable apportionment rule was first adopted. All prior decisions of this Court make it plain that a State appor-



tioned an equitable share of its own waters is not required to take, seize or condemn them from any other State or its citizens. Hence, Delaware's complaint that the Court of Appeals "has imputed a legal consequence to the decree not previously recognized," must be taken with the proverbial grain of salt - even ignoring the costly terms, "conditions and obligations" imposed upon New York to provide the downstream States with Spring-flood control, a water purification plant and a compensating flow several times the natural flow of the "summer river" (347 U.S. 995, 996-7 [1954]), of which Delaware was scarcely oblivious.*

*In acceding to the 1954 consent decree (347 U.S. 995), Delaware's brief to this Court stated (p. 16) - "it is admitted that at this time Delaware is unable to show damage by reason of greater diversions of the City of New York accompanied by substantially greater releases." The fact is that not a single Delaware riparian has ever claimed damages from the (Cont'd)

Interstate agreements are not jeopardized by the Court of Appeals' decision, as is baselessly contended.

(1)

Delaware cautions that unless certiorari is granted, the decision of the Court of Appeals denying "compensatory damages against the upstream taker," will likely result in "a diminished state interest in negotiating water agreements" (Amicus br., p. 8). It is thus said that the decision "encum-

---

city in the 25 years since its first diversions in 1955 from the East Branch (Pepacton) and Neversink River (Neversink), or in the 15 years since its first diversion in 1965 from the West Branch (Cannonsville). While it is basic that the rights of Delaware's riparians to the flow of New York's tributaries "can rise no higher" than those of Delaware (Nebraska v. Wyoming, supra), we note Delaware's failure to cite a single decision of its Courts recognizing any riparian right to compensation for a diminished flow, even of that State's share of interstate waters, when required for public use. See, Shively v. Bowlby, 152 U.S. 1, 23 (1894).



bers the management of interstate waters by attaching a penalty to a state's participation in any interstate equitable apportionment" - that penalty being "forfeiture" of the "right" of its riparians to compensation from the "upstream taker," and possible State "liability for the diminution of its downstream private riparians' rights" (Amicus br., p. 3).

We put aside the fact that the downstream States in the Delaware Basin "participated" in the equitable apportionment herein after decades of fruitless negotiations had led to a unilaterally planned diversion by the upstream State (New York), an injunction proceeding by New Jersey, and this Court's resolution of the conflict by an equitable apportionment to New York of a share of its own tributaries to the Delaware - on terms and conditions

consented to by the downstream States as fully protective of their rights to the benefits of the river (City's br., pp. 3-9; City's App., pp. 1-23). Delaware's in terrorem arguments as to the adverse effect of the Court of Appeals' decision upon future participation by downstream States in equitable apportionments are plainly grounded on that State's continued adherence to the proposition, repeatedly repudiated by this Court, that the lower State is entitled to the full and undiminished natural flow of the river - "the lower State is not entitled to have the stream flow as it would in nature" (Colorado v. Kansas, 320 U.S. 383, 385, 393 [1943]), or to "come down to it undiminished" (New Jersey v. New York, 283 U.S. 336, 343 [1931]).



Delaware, consequently, fails to recognize that the decision it complains of denies damages "against the upstream taker" because an upstream State equitably apportioned a share of the flow from its own tributaries by this Court - on heavy terms and conditions compensatory to the downstream States - has no occasion to "take" the flow thus apportioned it, each downstream State and its citizens having no right to more than an equitable share of the flow of an interstate stream. There is, consequently, no "forfeiture" of any "right" by citizens of a downstream State to the full natural flow of the river or to the upstream State's apportioned share thereof from its own tributaries, and no liability on the part either of the "up-

stream taker" or the downstream State to compensate any such non-existent "right."*

(2)

Turning from the general to the specific, Delaware next urges that since it has joined with the City and all parties to this Court's amended decree of 1954 in "a reappraisal of the Decree" - its "negotiating position has been prejudiced by the decision below" (Amicus br., p. 4). As we have previously pointed out, Congressional action in placing the "middle Delaware" in the National Wild and Scenic Rivers system has effectively shelved the Tocks Island project relied on by Pennsylvania and New Jersey to provide reservoir capacity for 756 mgd of Delaware River water for their joint use (City's App., pp. 26-27, 15-16, 22). Stating that negotiations are now in progress "to reexamine the decree in light of changed circumstances," Delaware asserts that the Court of Appeals' decision "poses questions about the State of Delaware's continued participation in these negotiations," because its "negotiating position has been prejudiced by the decision below" (Amicus br., pp. 4, 9).

Stripped of diplomatic niceties, Delaware's position boils down to this - since the City's huge reservoirs and

*Equally vacuous is Delaware's argument that the Court of Appeals' decision "would compel downstream riparians to seek recovery against their own sovereign" for an "inverse condemnation" based on that sovereign's participation in an equitable apportionment of interstate waters (Amicus br., pp. 7, 8). Apart from the fact that a riparian's rights in interstate waters rise no higher than those of its sovereign, which is only entitled to an equitable share thereof, this Court has made it abundantly clear that no such collateral attack on the policy of a State appearing before this Court in a dispute between States, can be tolerated. See cases cited, City's Main br., pp. 21, 26-27.

releases therefrom provide, presently and in the foreseeable future, the only major storage capacity for the lower States, the City will be far more manageable if liability to thousands of their riparians were held over its head as a sword of Damocles. Thus, the decision below "prejudices" Delaware's negotiating position and poses questions concerning its "continued participation in these negotiations." We prefer to attribute this blackmailing posture to the priority accorded the narrower interests of amicus Hackensack Water Co. by counsel simultaneously representing Delaware, rather than to that State itself.

In urging that the decision below "would disrupt the federal policy of encouraging interstate apportionment to resolve disputes among the states," ,



the amicus brief fails to recognize that no such policy can succeed by trampling over the rights of an upstream State to an equitable share of its own waters, or by inviting this Court to reverse sound and firmly established principles so as to require that State to "take" such share from lower State riparians who have no rights thereto.

## Conclusion

The petition for a writ of certiorari should be denied.

Dated: May 22, 1980

Respectfully submitted,

ALLEN G. SCHWARTZ,
Corporation Counsel of
the City of New York,
Attorney for Respondent.

L. KEVIN SHERIDAN,
MORRIS EINHORN,
of Counsel.

Supreme Court, U. S.
FILED
MAY 19 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

---

OCTOBER TERM, 1979

---

No. 79-1644

---

LLOYD F. and ELOISE L. CANFIELD,

Petitioners,

-against-

THE CITY OF NEW YORK,

Respondent.

---

# APPENDIX TO BRIEF OPPOSING WRIT OF CERTIORARI

---

ALLEN G. SCHWARTZ,
Corporation Counsel of
the City of New York,
100 Church Street
New York, N.Y. 10007
212-566-4338 (or 4375)

L. Kevin Sheridan,
Morris Einhorn,
of Counsel.

May 15, 1980

TABLE OF CONTENTS


| | | Page |
|---|---|---|
| Appendix I | Summary of Special Master's Report, Decision and Decree in New Jersey v. New York, 283 U.S. 336 (1931)..... | 1 |
| Appendix II | Summary of Special Master's Report, Decision and Decree in New Jersey v. New York, 347 U.S. 941, 945 (1954)..... | 11 |
| Appendix III | Summary of Delaware River Basin Compact.... | 24 |




APPENDIX I

THE 1931 APPORTIONMENT - NEW JERSEY v. NEW YORK, 283 U.S. 336 (1931).

(1)

In May of 1979, the State of New Jersey invoked this Court's original jurisdiction to enjoin the State of New York from proceeding with a planned diversion to the Hudson River watershed of 600 million gallons daily (mgd) from 5 New York streams tributary to the Delaware River (East Branch, Neversink River, Beaver Kill, Willowemoc, Little Delaware) to supply water to the City of New York (Special Master's Report [SM], pp. 5-7, 83). A Special Master (Charles Burch) was thereupon appointed to take testimony, make findings of fact and conclusions of law, as well as recommendations for a decree, and Pennsylvania was granted leave to

intervene (SM 1, 5). New Jersey v. New York, 280 U.S. 528, 533 (1930).*

In a report confirmed by this Court and described as "most competent and excellent" (283 U.S. at 343, 346), the Special Master noted that New York's planned diversion had been embodied in a compact recommended by a joint commission of the States bordering the Delaware, but had been denied ratification by the legislatures of New Jersey and Pennsylvania (SM 10-11, 39). He reported further that Trenton and other cities in New Jersey "take water for municipal and domestic purposes from the Delaware River"; that "Philadelphia takes 60% of its supply from the Delaware River"; that an upstream riparian's right to a reasonable share of the flow is recognized in all three States;

*The Special Master's report, as well as the entire record in that proceeding, were received at the joint trial herein as Ex. AY.



and that their public policy is to permit diversions from one watershed to another (SM 24, 35-37, 125-6).*

The Special Master then set forth New York's position that in seeking a share of its own waters for similar municipal and domestic purposes, it is reasonable to impound runoffs in the Spring "at high or flood stages" of the river, and make compensating releases thereto during the dry

*The Special Master described the Delaware as a river that "rises in the western slopes of the Catskill Mountains in the State of New York. There are two branches of the river, one known as the West Branch and one known as the East Branch," which "unite at Hancock, N.Y. and form the Delaware River proper. From Hancock the river flows in a southeasterly direction for a distance of approximately 75 miles to Tri-State Rock (Port Jervis, N.Y.) where it enters the State of New Jersey", that 75-mile stretch of the river forming the boundary between New York and Pennsylvania (SM 10-11, 39, 53-54). It then continues southerly 120 miles to Trenton, and an additional 92 miles "in a southerly direction as a tidal stream to Delaware Bay" (ibid).

summer and fall months when the river was "at a low stage" (SM 61).

New Jersey's opposing view was similarly set forth - to the effect that the proposed diversion would deprive New Jersey "and its citizens as riparian owners along the Delaware River of the natural, unobstructed and undiminished flow of its waters in violation of their rights under the common-law"; would increase "salinity of the water in the lower part of the Delaware River," thereby endangering "the municipal water supply of towns and cities in New Jersey"; and would adversely affect "use of the river for recreational purposes" (SM 8-9, 181-2).

The report then detailed Pennsylvania's position - that the doctrine of equitable apportionment should be applied to the waters of the Delaware and that the proposed



diversion of 600 mgd does not exceed New York's "fair and equitable share in the waters of the upper Delaware River and will not cause any substantial damages to its interests, if taken pursuant to the Pennsylvania plan of impounding and release," pursuant to which releases would be made from the City's impounding reservoirs "whenever the river drops to a low stage at either Port Jervis or at Trenton" (SM 67-69, 169, 183, 192). Pennsylvania also requested that Philadelphia and Eastern Pennsylvania "should be presently allotted 750 mgd from the Pennsylvania tributaries of the upper Delaware River as their fair and equitable share in the waters of that river," and that a River Master be appointed to regulate river flow (SM 183-186).

(2)

The Special Master concluded that "the doctrine of equitable apportionment announced in Wyoming v. Colorado (259 U.S. 419, 465) is one of general application regardless of whether the contesting states recognize the strict common law rule of riparian rights or some other rule of law"; that New York may not claim a "monopoly of the stream" as the upstream State, nor may New Jersey insist that "all the water of the Delaware originating in New York State shall flow into New Jersey totally undiminished"; and that the Supreme Court will determine whether a proposed diversion would "result in a state receiving more than its just share of the benefits of the stream" (SM 28, 32-33, 37). Reviewing the record proof as to the injurious effects of the proposed diversion upon the



river's sanitation, fishing, recreational, agricultural and industrial uses, the Special Master held that "the modification herein made of the New York Plan of diversion" would eliminate any possible claim of injury (SM 182, 125-6, 138, 146, 151, 158-9, 176, 207-8).

That modification consisted of reducing the planned diversion of 600 mgd from five New York tributaries to 440 mgd from two of them (East Branch and Neversink River) - "The taking of the equivalent of 440 mgd does not exceed New York's fair share under the doctrine of equitable apportionment," the "prayer of the Pennsylvania intervention for the application of the doctrine of equitable apportionment" being approved; requiring New York to adhere to the "Pennsylvania plan of release" which fixed 1535 cubic feet per second (cfs) at

Port Jervis and 3400 cfs at Trenton (998 mgd and 2210 mgd, respectively) as the minimum flow at those points; and requiring New York to erect a sewage treatment plant at Port Jervis to assure the downstream States a clean flow of water (SM 191, 195-6, 206-7, 125-6). Pennsylvania's requests for an allocation of 750 mgd and appointment of a River Master were both denied, without prejudice, as premature (SM 190-1, 211).

(3)

In confirming the Special Master's Report, this Court embodied all of his recommendations in its decree, including that restraining New York "from diverting water in excess" of 440 mgd (283 U.S. 336, 346-8, 305). The decree effectively required the City to erect oversize reservoirs with a storage capacity 45% greater than necessary to impound water for City use, so that com-



pensating releases could be made therefrom to assure a higher stage of the river during the dry season at Port Jervis and Trenton (283 U.S. at 346, 806).

The unanimous decision (Holmes, J.) rejected New Jersey's insistence "on a strict application of the common law governing private riparian proprietors subject to the same sovereign power," as well as its position that the recommended diversion would deprive "its citizens who are riparian owners of the undiminished flow of the stream" without compensation (283 U.S. at 342-344). It was there held that "a more liberal answer may be given" in controversies between States over their interstate waters than may be appropriate in a controversy between riparians in a single State because - "Different considerations come in when we are dealing

with independent sovereigns having to regard the welfare of the entire population" (ibid). Pointing out that a river "is more than an amenity, it is a treasure * * * that must be rationed among those who have power over it," this Court adopted and applied "the principle of equitable apportionment" (283 U.S. at 342-3). Since "possible experiences of the future may make modifications of the plan as it now stands necessary in unforeseen particulars," the decree provided for retention of jurisdiction "for the purpose of any order or direction or modification of this decree, or any supplemental decree that it may deem at any time to be proper" (283 U.S. at 344, 348).



## APPENDIX II

### THE 1954 APPORTIONMENT - NEW JERSEY v. NEW YORK, 347 U.S. 941, 995 (1954)

(1)

Due to the depression of the 1930's and the ensuing war conditions, it was not until the late 1940's that construction was commenced on the two reservoirs for impounding waters of the East Branch (Pepacton) and Neversink River (Neversink) authorized by the 1931 Decree.

"On April 1, 1952, the City of New York with the approval and support of the State of New York, moved under paragraph 6 of the 1931 decree for leave to file its petition to modify the decree by providing for diversion of additional quantities of water" from New York's other main tributary to the Delaware (the West Branch), "and for changes in

the prescribed formula for releasing water during low flow. The motion was granted. 343 U.S. 974. New Jersey and Pennsylvania filed answers opposing the proposed modifications, and the whole matter was referred to a Special Master." New Jersey v. New York, 345 U.S. 369, 371 (1953).

The State of Delaware was permitted to intervene (347 U.S. 941 [1954]), but Philadelphia's attempt to do so was rejected. This Court pointed out that under the parens patriae doctrine, Pennsylvania "when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens.' (citing cases)." 345 U.S. 369, 372 (1953). It was also there noted that Pennsylvania was an active party, had strongly opposed New Jersey's



position based on common-law riparian rights "since that proposition threatened the right of Philadelphia and Eastern Pennsylvania to continue their use and development of the Delaware River," and that Pennsylvania now opposed any additional diversion "not justified under the doctrine of equitable apportionment" (345 U.S. at p. 374).

(2)

In his Report to this Court of May 27, 1954, the Special Master (Kurt F. Panzer) noted the basic principles of law established in the prior proceeding "of controlling importance in the present case," namely - "that the interstate common-law doctrine of fair and equitable apportionment should prevail and be applied," and that any allocation to New York should not constitute a prior appropriation but

should be chargeable against their fair and equitable share in said waters" (SM 8-9).*

He then pointed out that although attempts of the Delaware Basin States between 1936 and 1951 to arrive at a compact had failed, agreement was nevertheless reached in the course of the current litigation which could properly be "buttressed by an adjudication on the part of this Court" (SM 36). It was thus noted that in opposing an additional diversion of 360 mgd to meet New York's present needs, Pennsylvania and New Jersey urged that the waters of the Delaware River "must be fairly and equitably apportioned between the four bordering States in accordance with their present and reasonable future

*The Special Master's report and the 12-volume record of the proceedings were admitted herein as Ex. AZ. Pages of his report similarly follow the letters SM.



needs" (SM 21-22). New York having agreed, however, to amend its petition by incorporating "a new release formula known as the 'Montague formula'," New Jersey consented thereto, and "requested an adjudication of its right to divert 100 mgd without compensating releases from the Delaware River watershed, as a part of its fair and equitable share of the waters of the Delaware River" (SM 22, 25).

The Special Master further reported that upon agreement between New Jersey and Pennsylvania to share the cost of a dam to impound Delaware River waters at Wallpack Bend, Pa., which "will yield 756 mgd for water supply purposes, of which Pennsylvania will take at least 70% or 529 mgd and New Jersey may take 30% or 22⅝ mgd under their negotiated settlement," Pennsylvania similarly

withdrew objection to the amended decree sought by New York - provided there "be no estoppel against her at any time in the future notwithstanding any expenditures made by any party" (SM 49, 64-66). In enacting the prerequisite legislation to assure the Wallpack Bend project, the New Jersey Legislature declared that - as a result of the City's oversize reservoirs for compensating releases during the dry season, "minimum flows of the river will be effectively increased" above its natural flow; "New York's expenditure for storage capacity to provide compensation flow alone will cost them approximately $30,000,000"; additional capacity for supplementary releases will also be provided by the City; and, in consequence thereof, "the beneficial effects of improved river regulation and of supplementary releases on sanitation, fish life, recreation



and industrial water supply are materially greater than * * * any possible detrimental effect of the diversion of high water flows by the City of New York" (N.J. Laws of 1953, c. 443 [R.S. Cum. Supp. 32: 20-24 et seq]).

(3)

In making his final recommendations, the Special Master noted the unchallenged proof that the "Delaware River and its tributaries produce more than enough water to meet the present additional requirements of the citizens of New Jersey, Pennsylvania and Delaware, if the surplus waters of winter and spring are stored for later release" (SM 30-31). He then pointed out that the average long-term runoff in the Delaware watershed above Trenton was 7640 mgd, 36% of which (2780 mgd) "is derived from the New York watershed" - so that

increasing the 440 mgd previously allotted New York to 800 mgd, means that "about 29% of New York's total runoff in the Delaware watershed" is to be thus apportioned, or 10.4% of the total runoff (7640 mgd) in the "entire watershed above Trenton" (SM 63-64).

It was similarly noted that the 178 billion gallon (BG) combined storage capacity of the two reservoirs erected on the East Branch and Neversink River would be increased to 269 BG upon addition thereto of the proposed reservoir (Cannonsville) on the West Branch (ibid). Since the "minimum or permanent volume of storage required for releases" was 85 BG, the Special Master pointed out that New York would therefore be required to devote a minimum of "32% of the City's Delaware storage, to the regulation of the lower river" (ibid). And this would maintain



the river's low flow at Montague (near Port Jervis) at 1750 cfs (1131 mgd) - i.e., at "an increase of 250% in the observed minimum flow" at Montague (322 mgd) prior to the City's release capacity (SM 82). As the Special Master further explained, in addition to thus providing storage capacity "for beneficial river regulation," the Montague formula required supplementary releases of up to 70 BG over and above the basic permanent releases of 85 BG annually, the supplementary releases required being dependent upon the difference between City consumption and total yield of its entire water supply system, only 45% of which derived from the Delaware watershed (SM 82, 74). The beneficial effects of that excess storage capacity in abating salt water intrusion from the ocean were also noted, and appointment of a River Master recommended (SM 84-86, 116).

(4)

The Special Master's Report was "in all respects approved and confirmed" and his recommendations embodied in a consent decree (347 U.S. 995, 996 [1954]). The 1931 decree was thereby amended and New York "enjoined from diverting water from the Delaware River or its tributaries except to the extent herein authorized and upon the terms and conditions herein provided." A total diversion of 800 mgd was authorized upon completion of the "proposed dam and reservoir at Cannonsville on the West Branch of the Delaware River," diversions and releases to be under the "direction of the River Master, hereinafter appointed and shall be subject to the following conditions and obligations" (ibid.). The first of those conditions and obligations was for "Compensating Releases - The Montague Formula"



(347 U.S. at 997).* Pursuant thereto, the City was required "to maintain a minimum basic rate of flow at the gauging station of the U.S. Geological Survey (USGS) at Montague" of 1750 cfs (1131 mgd) by releasing water "from one or more of its storage reservoirs in the upper Delaware watershed" - compliance by the City with the directions of the River Master being "full compliance" with that mandated release regime (347 U.S. at 997-8). In addition, whenever the safe yield of the City's total water supply from its three watersheds (Croton, Catskill, Delaware), fixed at "not less than 1665 mgd," exceeded consumption, 83% of such excess but "not to exceed 70 billion gallons"

*Montague, N.J. is 2 miles from Tri-State Rock (Port Jervis, N.Y.) where the 3 states of Pennsylvania, New Jersey and New York converge.

was to be released "to maintain a flow at Montague" of up to 2650 cfs (1,722 mgd) [347 U.S. at 998-9]. And a sewage treatment plant was to be maintained at Port Jervis (347 U.S. at p. 1001).

The amended decree also authorized New Jersey to "divert outside the Delaware River watershed, from the Delaware River or its tributaries in New Jersey, without compensating releases, the equivalent of 100 mgd" - on condition that New Jersey not repeal its L. 1953, c. 443 (ante, p. 16) and join Pennsylvania in requesting Congressional approval of their Wallpack Bend project (347 U.S. at p. 1001).* The Chief Hydraulic Engineer of the USGS was desig-

*In October of 1962, Congress authorized construction of Tocks Island Lake Project, embracing Wallpack Bend (16 U.S.C. §460 et seq.; Flood Control Act of 1962, Pub. Law 87-874).



nated as River Master to administer provisions of the decree "relating to yields, diversions and releases"; adjust daily releases to maintain the prescribed flow at Montague; report annually to the Court, etc. (347 U.S. at pp. 1002-3). The decree further provided that no diversion authorized thereby "shall constitute a prior appropriation" or an apportionment impervious to future modification - failure to file objections constituting no waiver "notwithstanding any action taken by any party under the terms of this decree" (347 U.S. at pp. 1004-5).

## APPENDIX III

THE 1961 COMPACT.

Seven years after entry of this Court's amended decree, the four Delaware Basin States entered into a compact creating the Delaware River Basin Commission (DRBC) composed of the Governor of each State and "one commissioner to be appointed by the President of the United States."*

As stated therein, "the purposes of this compact are to promote interstate comity; to remove causes of present and future controversy; to make secure and protect present developments within the states; to encourage and provide for the planning, conservation, utilization, de-

*Congressional approval is set forth in Pub. Laws of 1961, c. 87-328, 75 Stat. 688; see also, N.J.S.A. 32: 11D-1, et seq; 7 Del. Code Ann. §6501 et seq.; N.Y. Env. Conserv. Law, §21-0701 et seq. (L. 1961, c. 148, as amended by L. 1970, c. 262); 32 Penn. St. § 815.101 et seq.



velopment, management and control of the water resources of the basin; to provide for cooperative planning and action by the signatory parties with respect to such water resources" (17 1/2 McKinney's N.Y. Laws, Env. Conserv. Law, §21-0701, par. 1.3[e]). To effectuate long-range planning for the basin, the DRBC was to establish a "comprehensive multi-purpose plan" to provide for effective flood control, conservation, development of recreational facilities in relation to reservoirs, lakes and streams, propagation of fish and game, control movement of salt water upstream, and was to "adopt and promote uniform and coordinated policies for water conservation, control, use and management" (ibid., art. 3, par. 3.1).

The DRBC is empowered "in accordance with the doctrine of equitable apportion-

ment, to allocate the waters of the basin to and among the states signatory" - but it may not "impair, diminish or otherwise adversely affect the diversions, compensating releases, rights, conditions, obligations and provisions" of the Supreme Court's Amended Decree except by "unanimous consent of the Commission" during an emergency (Par. 3.3). The signatory States also agreed not to seek any modification of the Amended Decree that would alter the diversions or releases specified therein; and, "except upon the consent of all the parties to said decree," the DRBC was to exercise no jurisdiction over the "withdrawal, diversion or releases" there specified (Pars. 3.4, 3.5).*

*As reported by the DRBC, in 1978 "Congress put the Tocks Island reach of the Delaware in the National Wild and Scenic Rivers system," with the result that the Tocks Island project was effectively "shelved." However,

(footnote cont'd. on next page)



The Commission is accorded wide powers to acquire and control facilities for water storage and release, to regulate the river and its tributaries, "control future pollution and abate existing pollution," acquire and operate flood control facilities, develop hydroelectric power, regulate and operate facilities for "improvement of fish and wild life habitats," etc. (Pars. 4.1-4.3, 5.2, 5.3, 6.1, 8.1, 8.3[b], 8.4, 9.1-9.5, 10.2-10.4, 14.14). The compact is not to be construed as affecting or interfering with the law of each State "relating to riparian rights"; was expressly made subject to amendment; and its term fixed at 100 years (Pars. 1.6, 14.19, 14.20).

* (footnote cont'd. from previous page)

at the Commission's request, the parties entered "into serious good faith discussions to establish the arrangements, procedures and criteria for management of the waters of the Delaware Basin consistent with the compact." DRBC Annual Report 1978, pp. 4-5.

Supreme Court, U. S.
FILED
MAY 13 1980
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

**October Term, 1979**

No. 79-1644

LLOYD F. and ELOISE L. CANFIELD,
*Petitioners,*

*v.*

THE CITY OF NEW YORK,
*Respondent.*

## BRIEF *AMICUS CURIAE* OF HACKENSACK WATER COMPANY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

G. S. PETER BERGEN
*Attorney for Hackensack Water Company*
140 Broadway
New York, New York 10005
(212) 269-1100

*Of Counsel:*
LEBOEUF, LAMB, LEIBY & MACRAE
140 Broadway
New York, New York 10005

May 9, 1980

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| TABLE OF AUTHORITIES | ii |
| OPINIONS BELOW | 2 |
| JURISDICTION | 2 |
| QUESTION PRESENTED | 2 |
| CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED | 2 |
| INTEREST OF HACKENSACK WATER COMPANY | 3 |
| STATEMENT | 4 |
| ARGUMENT: | |
| I. An allocation of river flow between states by an equitable apportionment decree of the Supreme Court does not deprive injured downstream riparians of their constitutional right to compensation | 5 |
| II. Precedent requires payment of money damages to private riparians in a downstream state when they are injured by diversions in an upstream state | 8 |
| CONCLUSION | 10 |

## Table of Authorities

***Cases:***


PAGE

*Adams* v. *Greenwich Water Company*, 138 Conn. 205, 83 A.2d 177 (1951) ..... 7n

*Banigan* v. *City of Worcester*, 30 Fed. 392 (C.C.D. Mass. 1887) ..... 8n

*Bean* v. *Morris*, 221 U. S. 485 (1911) ..... 9

*Connecticut* v. *Massachusetts*, 282 U. S. 660 (1931) .... 6n

*Crown Simpson* v. *Costle*, ____ U. S. ____, No.79-797 (March 17, 1980) ..... 10

*Ferguson* v. *Village of Hamburg*, 272 N.Y. 234 (1936) 5n, 7n

*Hackensack Water Co.* v. *Village of Nyack*, 289 F.Supp. 671 (S.D.N.Y. 1968) ..... 3n

*Hinderlider* v. *LaPlata*, 304 U. S. 92 (1938) ..... 9

*Hughes* v. *Washington*, 389 U. S. 290 (1967) ..... 7n

*Juzek* v. *Hackensack Water Company*, 48 N.J. 302, 225 A.2d 335 (1966) ..... 4n

*Manville Co.* v. *City of Worcester*, 138 Mass. 89 (1884) ..... 8, 9

*Matter of Van Etten* v. *City of New York*, 226 N.Y. 483 (1919) ..... 7n

*Mayor, etc. of City of Paterson* v. *East Jersey Water Co.*, 74 N.J. Eq. 49, 70 A. 472 (1908), *aff'd.* 77 N.J. Eq. 558, 78 A. 1134 (E&A 1910) ..... 7n

*McCann* v. *Chasm Power Co.*, 211 N.Y. 301 (1914) ..... 6n

*New Jersey* v. *New York*, 347 U. S. 995 (1954) ..... 5n

*New Jersey* v. *New York*, 345 U. S. 369 (1953) ..... 7

*New Jersey* v. *New York*, 283 U. S. 336 (1931) ..... 5n

*New Jersey* v. *Sargent*, 269 U. S. 328 (1926) ..... 6n

*New York* v. *Illinois*, 274 U. S. 488 (1927) ..... 6n

*New York City* v. *Pine*, 185 U. S. 93 (1902) ..... 5n, 7n





PAGE

*Pine* v. *Mayor, et al. of City of New York*, 103 Fed. 337 (C.C. S.D.N.Y. 1900), *aff'd.* 112 Fed. 98 (2d Cir. 1901), *rev'd as to decree sub nom. New York* v. *Pine*, 185 U. S. 93 (1902) ..... 8

*Rockland County Anti-Reservoir Association* v. *Duryea*, 282 App. Div. 457, 123 N.Y.S.2d 445 (3d Dept. 1953) ..... 3n, 6n

*Smith* v. *City of Rochester*, 92 N.Y. 463 (1883) ..... 7n

*Sparks Mfg. Co.* v. *Town of Newtown*, 57 N.J. Eq. 367, 41 A. 385 (Ch. 1898) ..... 7n

*Spring Valley Water Works and Supply Co.* v. *Wilm*, 14 A.D.2d 658, 218 N.Y.S. 2d 800 (3d Dept. 1961) .... 3n, 6n, 7n

*Westphal* v. *City of New York*, 177 N.Y. 140 (1904) .... 5n


***Miscellaneous Materials:***


Northeastern United States Water Supply Study, Summary Report, North Atlantic Division, U. S. Army Corps of Engineers, New York, N.Y. (July, 1977) ..... 4n

IN THE

# Supreme Court of the United States

**October Term, 1979**

No. 79-1644

LLOYD F. and ELOISE L. CANFIELD,
*Petitioners,*

*v.*

THE CITY OF NEW YORK,
*Respondent.*

## BRIEF *AMICUS CURIAE* OF HACKENSACK WATER COMPANY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Hackensack Water Company ("Hackensack") hereby submits its brief *amicus curiae* in support of the Petition for a Writ of Certiorari, filed on April 18, 1980 by Petitioners Lloyd F. and Eloise Canfield in the above-captioned matter, seeking reversal of a judgment of the United States Court of Appeals for the Second Circuit entered in this case on February 25, 1980.

In accordance with this Court's Rule 42, Hackensack Water Company has received the written consent of counsel for both parties to file this brief *amicus curiae*. Copies of the consents have been filed with the Clerk.

## Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 606 F.2d 358 and is set forth in Appendix C to the Petition for a Writ of Certiorari. The opinion of the United States District Court for the Southern District of New York, which was reversed by the Court of Appeals, is reported at 450 F. Supp. 846 and appears in Appendix A to the Petition for the Writ of Certiorari.

## Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## Question Presented

Does an allocation of river flow between upstream and downstream riparian states by an equitable apportionment decree of the Supreme Court cut off the right of private owners of riparian lands in the downstream state to receive just compensation for damage to their riparian lands caused by diversions in the upstream state?

## Constitutional Amendments and Statutes Involved

The Fifth Amendment to the United States Constitution provides in part that:

> "nor shall private property be taken for public use, without just compensation."

The 14th Amendment provides in part that:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law."



The statutes involved are referred to in the Petition for Writ of Certiorari at pp. 3-4.

## Interest of Hackensack Water Company

Hackensack provides water service to homes, businesses, and industry in 60 communities of northern New Jersey's populous Bergen and Hudson Counties. Spring Valley Water Company, a wholly owned subsidiary of Hackensack, serves most of Rockland County, New York. More than one million people live in the 282 square mile service areas of the two companies. Most of the water supplied to these consumers is drawn from the Oradell Reservoir in New Jersey, the Lake Tappan Reservoir which straddles the state line, and the Deforest Lake Reservoir in New York. These reservoirs are in the watershed of the Hackensack River, which rises in Rockland County, New York, flows across the interstate boundary, and ultimately discharges into Newark Bay below Oradell, New Jersey.

Hackensack has financed and maintains its extensive water works properties in reliance, *inter alia*, on the long established common law of riparian rights, which applies in both New Jersey and New York.[1]

---

1. Further insight into Hackensack's development of the Hackensack River basin, and related riparian rights and regulatory problems, is given by the following published judicial decisions: ***Rockland*** *County Anti-Reservoir Association* v. *Duryea,* 282 App. Div. 457, 123 N.Y.S. 2d 445 (3d Dept. 1953) [affirming New York State's permit allowing construction of Deforest Lake Reservoir and allocating certain flows to Hackensack in New Jersey]; *Spring Valley Water Works and Supply Co.* v. *Wilm,* 14 A.D. 2d 658, 218 N.Y.S. 2d 800 (3d Dept. 1961) [affirming New York State's permit allowing the Village of Nyack to divert from the Hackensack River in New York, but noting that the Village's taxing power is sufficient to indemnify Hackensack for any injury occasioned by the Village's diversion]; *Hackensack Water Co.* v. *Village of Nyack,* 289 F. Supp. 671 (S.D. N.Y. 1968) [denying Hackensack's motion for partial summary judgment in an "inverse condemnation" action for damages against the Village as a result of the Village's diversion. The action was later settled during trial before Judge Weinfeld. Under the settlement,

Hackensack, being a private riparian owner located on the Hackensack River downstream in New Jersey, finds the Second Circuit's decision in *Canfield,* review of which is herein requested, to be unprecedented, contrary to expectations, and unsettling, to say the least. Hackensack submits that because riparian rights are interests in land, a taking, in whole or in part, of those interests for public use requires the payment of just compensation, whether or not the taking was caused by a diversion in an upstream state, or in the same state in which the private riparian resides. Accordingly, Hackensack's interest in this petition is to assure that investment in riparian property is protected. Hackensack believes that the Second Circuit's decision, if not reversed, will result in substantial needless litigation and controversy in the future, and could frustrate future development of needed public water supplies.

## Statement

The salient features of the decisions below are described in the Statement of the Case provided in petitioners' brief at page 4 to page 8. That discussion need not be repeated here.

The question presented has extremely important ramifications, not only regarding the security of existing riparian property, but also with respect to the financing of new water supply development throughout the northeastern United States which is badly needed in the near future.[2]

---

the Village agrees to pay Hackensack for water diverted in excess of certain amounts as provided in the agreement between the parties. See also *Juzek* v. *Hackensack Water Company,* 48 N. J. 302, 225 A. 2d 335 (1966), relating to condemnation of watershed lands for water supply purposes in New Jersey.

2. *See* Northeastern United States Water Supply Study, Summary Report, North Atlantic Division, U.S. Army, Corps of Engineers, New York, N.Y. (July, 1977).



# ARGUMENT

## I

## AN ALLOCATION OF RIVER FLOW BETWEEN STATES BY AN EQUITABLE APPORTIONMENT DECREE OF THE SUPREME COURT DOES NOT DEPRIVE INJURED DOWNSTREAM RIPARIANS OF THEIR CONSTITUTIONAL RIGHT TO COMPENSATION

The Second Circuit's decision, reversing the award of damages for a taking of private riparian property, is clearly in error and should be reversed.

The District Court correctly found that plaintiffs Canfield, *et al.,* as riparian owners, enjoyed property rights, just as owners of land in fee simple enjoy property rights (450 F. Supp. at 861-4; App. at pp. 52a-69a). The District Court further found that plaintiffs' property had been taken for a public use by reason of New York City's upstream diversion, and awarded money damages (450 F. Supp. at 873-6; App. at 111a-137a). Thus, the District Court properly treated the matter as an inverse condemnation claim.[3]

While the Supreme Court's equitable apportionment of the Delaware River's flow[4] settled the allocation of water among quasi-sovereign riparian states, such apportionment did not destroy the constitutional right of Pennsylvania riparians to recover money damages which they actually suffered and were able to prove as a consequence of New York's diversions (450 F. Supp. at 866-7; App. at p. 78a-79a). Hackensack submits that an allocation of flow between adjacent states is only an allocation. Whether such

---

3. See *Ferguson* v. *Village of Hamburg,* 272 N.Y. 234 (1936); *Westphal* v. *City of New York,* 177 N.Y. 140 (1904); and *New York City* v. *Pine,* 185 U.S. 93 (1902).

4. See *New Jersey* v. *New York,* 283 U.S. 336 (1931); *New Jersey* v. *New York,* 347 U.S. 995 (1954).

an allocation is made by Supreme Court decree[5], or by unilateral decision of an upstream state with which the downstream state tacitly agrees,[6] the question of whether damages must be paid to riparians in a downstream state is not part of the decision to allocate. Such question may only be decided if and when actual damages occur and can be proved.[7] Accordingly, the District Judge's analysis in *Canfield* was correct and in accordance with long established precedents.

The Second Circuit, on the other hand, ruled that the Supreme Court's equitable apportionment of the Delaware deprived downstream riparians of their right to compensation. The Second Circuit reasoned that to require payment of damages to riparians in Pennsylvania:

> "... would hobble or possibly even destroy the effect of Supreme Court decrees or Congressionally approved interstate water compacts by subjecting those who rely upon the provisions of the decrees or interstate compacts to unreasonable damage burdens" (606 F.2d at 366; App. at 16e).

The Second Circuit's reasoning appears to be premised on two obviously false propositions. The first is that an apportionment decree or an interstate compact imposes an affirmative requirement to develop a water supply. However, an apportionment is only an allocation of the flow, not a directive to take riparian property without paying damages.

5. *Id.;* see also *Connecticut* v. *Massachusetts,* 282 U.S. 660 (1931).

6. See *Rockland County Anti-Reservoir Association* v. *Duryea, supra,* approving a state administrative agency's allocation of the Hackensack River's flow between New York and New Jersey.

7. See *Spring Valley Water Works and Supply Co.* v. *Wilm, supra; New York* v. *Illinois,* 274 U.S. 488 (1927); *New Jersey* v. *Sargent,* 269 U.S. 328 (1926); and *McCann* v. *Chasm Power Co.,* 211 N.Y. 301 (1914).



The Second Circuit's next proposition is that the City would be subjected to "unreasonable damage burdens" if it had to pay for its taking of riparian property in Pennsylvania.[8] This reasoning defies logic, precedent, and common sense. New York City, like cities elsewhere in the northeast, routinely pays compensation upon condemnation of private riparian rights, just as it does when condemning private lands for highways, parks, and other public facilities.[9] The Second Circuit had no basis upon which to conclude that the City's damage burden to Pennsylvania riparians would be "unreasonable". It further had no basis to conclude that the right of Pennsylvania riparians to compensation was destroyed by the Supreme Court's equitable apportionment decree.[10] Moreover, private riparians are barred by the Eleventh Amendment from appearing in equitable apportionment proceedings in the Supreme Court's original jurisdiction to protect their private interests (see *New Jersey* v. *New York,* 345 U.S. 369 (1953)).

8. Compare *Spring Valley Water Works and Supply Co.* v. *Wilm, supra,* where it was held that a Village's taxing power was sufficient to indemnify a downstream riparian in another state if damages were proved.

9. See *Matter of Van Etten* v. *City of New York,* 226 N.Y. 483 (1919); *Ferguson* v. *Village of Hamburg, supra; Smith* v. *City of Rochester,* 92 N.Y. 463 (1883); *New York* v. *Pine, supra; Adams* v. *Greenwich Water Company,* 138 Conn. 205, 83 A.2d 177 (1951); *Sparks Mfg. Co.* v. *Town of Newtown,* 57 N.J. Eq. 367, 41 A. 385 (Ch. 1898); *Mayor, etc. of City of Paterson* v. *East Jersey Water Co.,* 74 N.J. Eq. 49, 70 A. 472 (1908), *aff'd.* 77 N.J. Eq. 558, 78 A. 1134 (E&A 1910).

10. See *Hughes* v. *Washington,* 389 U.S. 290 (1967), at 298: The Constitution forbids a retroactive transformation of private into public property by judicial decree (concurring opinion of Stewart, J.).

## II

## PRECEDENT REQUIRES PAYMENT OF MONEY DAMAGES TO PRIVATE RIPARIANS IN A DOWNSTREAM STATE WHEN THEY ARE INJURED BY DIVERSIONS IN AN UPSTREAM STATE

The Second Circuit ignored its own precedent, *Pine* v. *Mayor, et al. of City of New York,* 103 Fed. 337 (C.C. S.D. N.Y. 1900), *aff'd.* 112 Fed. 98 (2d Cir. 1901), *rev'd. as to decree sub nom. New York* v. *Pine,* 185 U.S. 93 (1902). *Pine* was an equity action commenced by Connecticut riparians to enjoin diversions by New York City for public water supply from the Byram River which rises in New York and flows into Connecticut. The Circuit Court ordered an injunction against the City, unless the parties settled by a given date as to the amount of compensation to be paid. The Supreme Court reversed as to the decree reasoning that the conditional injunction gave Pine an unfairly superior bargaining position, and remanded with instructions to enter a decree providing for the ascertainment of damages.

Another diversion suit involving private riparians in different states is *Manville Co.* v. *City of Worcester,* 138 Mass. 89 (1884). In that case, plaintiff owned a mill in Rhode Island on the Blackstone River. Defendant City diverted water from a tributary upstream in Massachusetts. The Supreme Judicial Court of Massachusetts, per Holmes, J., held that plaintiff could recover damages notwithstanding that his mill was situated in Rhode Island. He reasoned that there was a concurrence of the domestic law of both states as to the illegality of an uncompensated diversion, and that, therefore, the liability could be enforced in either state.[11]

11. Accord: *Banigan* v. *City of Worcester,* 30 Fed. 392 (C.C.D. Mass. 1887).



The *Manville* case was followed by the Supreme Court in *Bean* v. *Morris,* 221 U.S. 485 (1911), in which Justice Holmes affirmed a lower court's order awarding appropriations among interstate private parties on the same basis as if they had been located in the same state.

The Second Circuit refused to follow these precedents. The Second Circuit further erroneously interpreted *Hinderlider* v. *LaPlata,* 304 U.S. 92 (1938), in which injunctive relief only was requested. The case did not involve a claim for damages.[12]

Accordingly, the Second Circuit erred by failing to recognize that the riparian rights laws of New York and Pennsylvania, being in concurrence, require that money damages be paid to downstream riparians who can prove actual damages.

12. See the Petition for a Writ of Certiorari at 19-20.

## CONCLUSION

The Second Circuit's decision holds that this Court's equitable apportionment decrees in *New Jersey* v. *New York* operate to confiscate private property. This unprecedented result plainly warrants this Court's attention and the petition for a writ of certiorari should be granted. The Second Circuit's error, if not rectified, will likely result in substantial future uncertainty and litigation. Amicus respectfully requests that the Court consider granting certiorari, reversing the judgment of the Court of Appeals on the basis of the District Court's exceptionally lucid opinion, and remanding for further proceedings.[13]

Respectfully submitted,

G. S. Peter Bergen
*Attorney for Hackensack Water Company*
140 Broadway
New York, New York 10005
(212) 269-1100

*Of Counsel:*
LeBoeuf, Lamb, Leiby & MacRae
140 Broadway
New York, New York 10005

May 9, 1980

---

13. Cf. *Crown Simpson* v. *Costle*, — U.S. — , No. 79-797 (March 17, 1980).

Supreme Court, U. S.
FILED
MAY 16 1980
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1979

No. 79-1644

LLOYD F. AND ELOISE L. CANFIELD,
*Petitioners,*

v.

THE CITY OF NEW YORK,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## BRIEF OF STATE OF DELAWARE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

RICHARD S. GEBELEIN
State Office Building
820 North French Street
Wilmington, Delaware 19801
(302) 571-3838
*Attorney General of the State of Delaware*

*Of Counsel:*
EUGENE R. FIDELL
AUSTIN P. OLNEY
ALAN KONEFSKY
LEBOEUF, LAMB, LEIBY & MACRAE
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

May 16, 1980

## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| OPINIONS, JUDGMENTS, AND ORDERS BELOW | 2 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED | 2 |
| CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED | 3 |
| INTEREST OF THE STATE OF DELAWARE | 3 |
| STATEMENT OF THE CASE | 4 |
| REASONS FOR GRANTING THE WRIT | |
| I. THE SECOND CIRCUIT'S CONCLUSION THAT AN INTERSTATE EQUITABLE APPORTIONMENT EXTINGUISHES A PRIVATE RIPARIAN OWNER'S RIGHT TO DAMAGES FROM AN UPSTREAM DIVERTER CONFLICTS WITH PRIOR DECISIONS OF THIS COURT | 5 |
| II. THE SECOND CIRCUIT DECISION, IF ALLOWED TO STAND, MUST LEAD EITHER TO A DEPRIVATION OF PRIVATE RIPARIAN OWNERS' CONSTITUTIONAL RIGHT TO COMPENSATION OR TO A RESULT CONTRARY TO FEDERAL WATER RESOURCE MANAGEMENT POLICY | 6 |
| III. THE SECOND CIRCUIT DECISION DIRECTLY AFFECTS THIS COURT'S EXERCISE OF ORIGINAL AND EXCLUSIVE JURISDICTION OVER CONTROVERSIES BETWEEN STATES | 10 |
| CONCLUSION | 11 |

## TABLE OF AUTHORITIES


Page

CASES:

*Adams v. Greenwich Water Co.*, 138 Conn. 205, 83 A.2d 177 (1951) ..... 6

*Badgley v. City of New York*, 606 F.2d 358 (2d Cir. 1979) ..... *passim*

*Dugan v. Rank*, 372 U.S. 609 (1963) ..... 7

*Elwood v. City of New York*, 450 F. Supp. 846 (S.D.N.Y. 1978) ..... 2

*Ferguson v. Village of Hamburg*, 272 N.Y. 234, 5 N.E.2d 801 (1936) ..... 6

*Harrisonville v. Dickey Clay Mfg. Co.*, 289 U.S. 334 (1933) ..... 6

*Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) ..... 5

*In re Van Etten v. City of New York*, 226 N.Y. 483, 124 N.E. 201 (1919) ..... 6

*Land v. Dollar*, 330 U.S. 731 (1947) ..... 7

*New Jersey v. New York*, 283 U.S. 336 (1931) ..... 5

*New Jersey v. New York*, 347 U.S. 995 (1954) ..... 4

*New York City v. Pine*, 185 U.S. 93 (1902) ..... 6

*Smith v. City of Rochester*, 92 N.Y. 463 (1883) ... 6

CONSTITUTION:

U.S. CONST. art. III, §2 ..... 10

U.S. CONST. amend. V ..... 6

U.S. CONST. amend. XIV, §1 ..... 6





Page

STATUTES:

28 U.S.C. § 1251 (Supp. II 1979) ..... 10

28 U.S.C. §1254(1) (1976) ..... 2

DEL. CODE ANN. tit. 7, §6501 *et seq.* (1975) ..... 4

Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688 (1961) ..... 4

Water Resources Planning Act, §2, 42 U.S.C. §1962 (1976) ..... 8

MISCELLANEOUS:

DELAWARE RIVER BASIN COMMISSION, ANNUAL REPORT (1978) ..... 4

DELAWARE RIVER BASIN COMMISION, FINAL REPORT AND ENVIRONMENTAL IMPACT STATEMENT OF THE LEVEL B STUDY (1979) ..... 9

DELAWARE RIVER BASIN COMMISSION, RES. 78-20 (1978) ..... 4

IN THE

# Supreme Court of the United States

**October Term, 1979**

**No. 79-1644**

LLOYD F. AND ELOISE L. CANFIELD,

*Petitioners,*

v.

THE CITY OF NEW YORK,

*Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

---

## BRIEF OF STATE OF DELAWARE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

---

Pursuant to Rule 42(1) and (4) of the Rules of this Court, the State of Delaware by its Attorney General respectfully submits its brief as *amicus curiae* in support of the petition by Lloyd F. and Eloise L. Canfield for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this case on September 27, 1979 in that court's Docket No. 78-7199.

## OPINIONS, JUDGMENTS, AND ORDERS BELOW

The opinion of the United States District Court for the Southern District of New York, *Elwood v. City of New York*, which awarded judgment in favor of petitioners and others similarly situated, is reported at 450 F. Supp. 846 and appears in Appendix A to the petition for writ of certiorari. The judgment of the District Court appears in Appendix B to the petition for writ of certiorari. The opinion of the Court of Appeals, *Badgley v. City of New York* ("*Badgley*"), which reversed the judgment of the District Court, is reported at 606 F.2d 358 and appears in Appendix C to the petition for writ of certiorari. The judgment of the Court of Appeals appears in Appendix D to the petition for writ of certiorari. The orders of the Court of Appeals, which denied rehearing and rehearing *en banc*, appear in Appendix E to the petition for writ of certiorari.

## JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) (1976).

## QUESTIONS PRESENTED

1. Whether a private riparian owner's right to compensatory damages from an upstream diverter survives an interstate equitable apportionment of waters by a Supreme Court decree or by interstate compact.

2. Whether the Second Circuit rule effects a deprivation of private riparian owners' constitutional right to just compensation.

3. Whether the Second Circuit rule contradicts the federal policy to encourage interstate cooperation for river management.



## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The constitutional, statutory, and regulatory provisions involved are referred to in the petition for writ of certiorari at pages 3-4, and are found in Appendix F thereto.

## INTEREST OF THE STATE OF DELAWARE

The Second Circuit holding adversely affects the rights of Delaware riparian owners, who are situated downstream in the Delaware River Basin. *Badgley* extinguishes the downstream riparians' right to compensation from upstream out-of-state diverters acting under an interstate equitable apportionment. The holding below suggests that Delaware riparians can seek compensatory damages only from the State of Delaware. Delaware seeks to affirm its riparian citizens' historic right to compensatory damages against the upstream diverter. The state also seeks to have this Court overrule the Second Circuit's novel suggestion that downstream riparians must sue their own state in order to be compensated.

The Second Circuit holding encumbers the management of interstate waters by attaching a penalty to a state's participation in any interstate equitable apportionment: the state forfeits its private riparian owners' right to compensation against the upstream diverter. The Second Circuit holding also suggests that a state's participation in an interstate equitable apportionment exposes that state to liability for the diminution of its downstream private riparians' rights. Delaware seeks to protect its ability to participate freely in the interstate management of the Delaware River Basin.

Delaware is a party to this Court's 1954 decree[1] and a signatory of the Delaware River Basin Compact.[2] It participates in the continuing activities of the Delaware River Basin Commission on interstate water management issues. It has joined the other Basin states and New York City in a reappraisal of the Decree.[3] The negotiations are still in progress, but Delaware's negotiating position has been prejudiced by the decision below. Delaware has a direct and immediate interest in the resolution by this Court of the serious problems raised by the *Badgley* decision.

## STATEMENT OF THE CASE

Salient features of the decisions below are described in the Statement of the Case provided in the petition for writ of certiorari at pages 4-8.

---

[1] *New Jersey v. New York*, 347 U.S. 995 (1954) ("Decree").

[2] Pub. L. No. 87-328, 75 Stat. 688 (1961) ("Compact"). Delaware's ratification of the Compact is found at DEL. CODE ANN. tit. 7, §6501 *et seq.* (1975).

[3] On December 13, 1978, the Delaware River Basin Commission ("DRBC") adopted unanimously a resolution inviting the parties to the Decree to "enter into serious good faith discussions to establish the arrangements, procedures, and criteria for management of the waters of the Delaware Basin consistent with the Compact." DRBC, RES. 78-20 (1978). The ensuing exchange of letters between the parties to the Decree is described in the DRBC, ANNUAL REPORT 5 (1978).



## REASONS FOR GRANTING THE WRIT

### I.

### THE SECOND CIRCUIT'S CONCLUSION THAT AN INTERSTATE EQUITABLE APPORTIONMENT EXTINGUISHES A PRIVATE RIPARIAN OWNER'S RIGHT TO DAMAGES FROM AN UPSTREAM DIVERTER CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

Equitable apportionment of interstate waters may be effectuated either by Supreme Court decree or by interstate compact. *Compare New Jersey v. New York*, 283 U.S. 336 (1931) (decree) *with Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) (compact). *See especially id.* at 104. The precedents of this Court establish the principle that equitable apportionment of interstate waters extinguishes the private riparian owner's remedy to seek injunctive relief in order to obtain water in excess of his state's share. *See, e.g., Hinderlider*, 304 U.S. at 102. Without citation of authority, the Second Circuit in *Badgley* extended the principle of *Hinderlider* to deny riparian owners the remedy of compensatory damages. In so doing, the Second Circuit ignored the underlying rationale behind the principle that private riparian owners cannot compel specific relief in the form of a water flow in excess of the amount permitted under an equitable apportionment of interstate waters. This rationale is that enforcement of a private riparian right to enjoy an excess level of flow would disrupt the interstate equitable allocation established by agreement among states. The elevation of a private right to specific performance above an interstate agreement cannot be tolerated. The facts in *Hinderlider*, the principal authority relied upon by the Second Circuit, dramatically illustrate the physical impossibility of satisfying a private right to specific performance without disrupting an interstate apportionment.

However, the danger of disrupting an interstate equitable allocation is in no way present in a regime allowing private damage actions for infringement on riparian rights. Precedent, moreover, clearly distinguishes between vindication of riparian rights through injunctive relief and through compensatory damages. Damages may provide alternative relief when public policy requires denial of injunctive relief. *See, e.g., Harrisonville v. Dickey Clay Mfg. Co.*, 289 U.S. 334, 338 (1933); *New York City v. Pine*, 185 U.S. 93, 97 (1902). As shown below, the Second Circuit's failure to distinguish the two needlessly presents a serious constitutional problem and would disrupt the federal policy of encouraging interstate apportionment to resolve disputes among the states.

## II.

## THE SECOND CIRCUIT DECISION, IF ALLOWED TO STAND, MUST LEAD EITHER TO A DEPRIVATION OF PRIVATE RIPARIAN OWNERS' CONSTITUTIONAL RIGHT TO COMPENSATION OR TO A RESULT CONTRARY TO FEDERAL WATER RESOURCE MANAGEMENT POLICY.

Downstream riparian owners have a constitutional right[4] to compensation for an upstream governmental taking of riparian rights. *Adams v. Greenwich Water Co.*, 138 Conn. 205, 83 A.2d 177, 183 (1951); *Ferguson v. Village of Hamburg*, 272 N.Y. 234, 5 N.E.2d 801 (1936); *In re Van Etten v. City of New York*, 226 N.Y. 483, 124 N.E. 201 (1919); *Smith v. City of Rochester*, 92 N.Y. 463 (1883). *See New York City v. Pine*, 185 U.S. 93 (1902). The Second Circuit in *Badgley* has overlooked the constitutional issue of taking without compensation.

Although the State of Delaware does not read *Badgley* as dealing with the constitutional issue at all, arguably the Second Circuit may be addressing the question by its suggestion that

[4] U.S. CONST. amends. V. and XIV, §1.



downstream riparians seek recovery against their own sovereigns. 606 F.2d at 370. In any event, the Second Circuit's decision, by denying a right of recovery against the upstream diverter, would compel downstream riparians to seek recovery against their own sovereigns. This result cannot be allowed to stand.

The assumption that the private riparian may vindicate his rights by securing a remedy, including the recovery of damages, from his sovereign is unwarranted. A downstream state is neither a tort-feasor nor directly a property-taker under principles of eminent domain. The only basis upon which a private riparian might proceed against his state would be on a theory of inverse condemnation based on the state's participation in an interstate compact or proceedings in this Court leading to an equitable apportionment decree. In either case, absent its consent, the state's activity would be insulated from attack by the private riparian, on principles of sovereign immunity. *See Dugan v. Rank*, 372 U.S. 609 (1963); *Land v. Dollar*, 330 U.S. 731, 738 (1947).

Although the doctrine of sovereign immunity bars a cause of action against the downstream state, the State of Delaware, recognizing the constitutional deprivation that would otherwise ensue, may choose as a matter of policy to grant downstream riparians compensation. This possibility inhibits the state's participation in river basin management. If *Badgley* were read to establish a cause of action against the downstream state, an additional deterrent to continued interstate cooperation would be erected. The state would be acting at its peril in agreeing to any changes in existing interstate equitable apportionments or in agreeing to any change in the *status quo* of interstate water use. Any modification would affect riparian rights and give rise to a corresponding claim against the state. Such a burden on

interstate river cooperation is contrary to the federal policy to encourage interstate cooperation in management of river resources, a policy embodied in the Delaware River Basin Compact. *See, e.g.*, Water Resources Planning Act, §2, 42 U.S.C. §1962 (1976).

The Delaware River Basin Compact established the DRBC in order to manage more effectively the interstate water resources of the Basin. The signatories expressly preserved existing riparian rights along the Delaware. These provisions were added by the signatories, including the federal government, to "assuage the fears of those who may think that the compact will change private water rights."[5]

At the time the Compact was signed, federal law recognized that interstate apportionments of water restricted only the equitable remedies available to a riparian owner affected by the apportionment. It was not until *Badgley* that a federal court held that an interstate equitable apportionment also barred recovery for compensatory damages against the upstream taker. The State of Delaware has never considered that its actions affecting interstate allocations of water could be construed to deprive its riparian citizens of the right to recover against an out-of-state diverter. The state also never contemplated that these activities could create a cause of action against itself, as the *Badgley* case suggests. The holding of *Badgley* affects riparian rights in a manner never contemplated by the Compact and is in conflict with the policy of interstate cooperation.

If *Badgley* is permitted to stand, the likely result will be a diminished state interest in negotiating interstate water agreements. Interstate apportionments historically diminish the flow available to downstream states and their citizens. The *Badgley* case, unfortunately, also would effectively require participating states to concede their riparian citizens' right to be compensated

[5] Delaware River Basin Advisory Committee Meeting Staff Summary of Discussion, *cited in* Appendix H to the petition for writ of certiorari at 1h.



by the upstream diverter for the ensuing injury. This result localizes the burden of an equitable apportionment on the downstream state. The downstream state and its citizens would suffer a loss without compensation from the upstream diverter. The upstream diverter would gain his benefits without compensating the injured out-of-state interests. The paradoxical result of *Badgley* is that an unreasonable upstream diversion may be partially constrained through an apportionment of waters, but the downstream state loses its right to water, and its riparian citizens lose a right of compensation, unless they can proceed against their own state. If, as the Second Circuit suggests, they can proceed, then the sovereign would lose rights to water on behalf of its citizens and also would have to pay damages to its private riparian owners. Under either result, the downstream state loses any incentive to engage in interstate negotiation of water rights. Of immediate interest and concern are the negotiations which have been in progress for more than a year between the parties to the Decree.[6] These discussions are designed to reexamine the Decree in light of changed circumstances. These circumstances include the fact the main stream impoundment contemplated by the Decree has never been constructed and the recognition that the diversion and flow targets in the Decree cannot be met simultaneously during a severe drought.[7] The *Badgley* decision poses questions about the State of Delaware's continued participation in these negotiations.

*Badgley* establishes that a modification of the Decree, sanctioned by this Court, will result in the destruction of the rights of Delaware citizens to be compensated for upstream diversions or, in the alternative, in the exposure of the State of Delaware to suits for compensatory damages by its riparian citizens.

[6] *See* DRBC, ANNUAL REPORT 4 (1978).

[7] *See* DRBC, FINAL REPORT AND ENVIRONMENTAL IMPACT STATEMENT OF THE LEVEL B STUDY 57 (1979).

## III.

## THE SECOND CIRCUIT DECISION DIRECTLY AFFECTS THIS COURT'S EXERCISE OF ORIGINAL AND EXCLUSIVE JURISDICTION OVER CONTROVERSIES BETWEEN STATES.

The *Badgley* decision, although arising under the diversity jurisdiction, directly affects the Decree, a matter of continuing, exclusive and original jurisdiction.[8] The Second Circuit, in determining that the Decree extinguished the right of private riparians to recover compensatory damages from out-of-state, upstream diverters, has imputed a legal consequence to the Decree not previously recognized. Because of the *Badgley* decision's direct effect on the operation of the Decree, this Court should issue the writ to consider these questions which are entwined with its original and exclusive jurisdiction.

[8] CONST. art. III, §2; 28 U.S.C. §1251 (SUPP. II 1979).



## CONCLUSION

For these reasons, this Court should issue a writ of certiorari to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

RICHARD S. GEBELEIN
State Office Building
820 North French Street
Wilmington, Delaware 19801
(302) 571-3838
*Attorney General of the State of Delaware*

*Of Counsel:*

EUGENE R. FIDELL
AUSTIN P. OLNEY
ALAN KONEFSKY
LEBOEUF, LAMB, LEIBY & MACRAE
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

May 16, 1980